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# MILITARY LAW REVIEW

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*Major Melburn N. Washburn*

### RELATIONSHIP BETWEEN APPOINTED AND INDIVIDUAL DEFENSE COUNSEL

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### ONE HUNDREDTH ANNIVERSARY OF THE LIEBER CODE

**HEADQUARTERS, DEPARTMENT OF THE ARMY  
JULY 1963**

## PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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# JOSEPH HOLT

## Judge Advocate General

### 1862-1875

While prior judge advocates of the Army are included in the lists of Judge Advocates General of the Army, the statutory office of The Judge Advocate General of the Army did not exist until the passage of Section 5, Act of 17 July 1862 (12 Stat. 598). The importance attached to the office at that time is attested to by the man President Lincoln selected as its occupant—Joseph Holt of Kentucky, eminent statesman, lawyer, and orator.

General Holt was born in Breckenridge County, Kentucky, on January 6, 1807, and was educated at Saint Joseph's College and Centre College, both in Kentucky. As was customary at that time, he read law in a law office and, in 1828, began his practice. For the next 20 years he practiced law in Kentucky and Mississippi, distinguishing himself in both states. In 1836 he achieved national fame as an orator at the Democratic National Convention by virtue of his oratory on behalf of the Vice-presidential candidate.

After having spent nine years in Europe, General Holt returned to Washington in 1857. President Buchanan appointed him Commissioner of Patents in that year, Postmaster General in 1859, and Secretary of War the following year, a position he held until ~~President~~ Lincoln took office in 1861. In 1862 President Lincoln appointed Joseph Holt Judge Advocate General of the Army with the rank of colonel and, in 1864, he was elevated to the rank of brigadier general and became the first general officer to head the office of The Judge Advocate General, an office he held until 1875. General Holt attached such importance to his office that he declined tenders of the offices of Attorney General by President Lincoln and Secretary of War by President Grant. He was prominent in many military trials, notably the trial of President Lincoln's assassins. For his faithful and meritorious service during the Civil War, he was brevetted a major general.

In 1875 General Holt was retired at his own request and took up residence in the District of Columbia until his death in 1894 at the age of 87.

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# KIDNAPPING AS A MILITARY OFFENSE\*

BY MAJOR MELBURN N. WASHBURN\*\*

## I. INTRODUCTION

In 1960, two prisoners escaping from a military stockade at Fort Carson, Colorado, kidnapped a pard. Their subsequent trial by general court-martial started a judicial process culminating in holdings by the United States Court of Military Appeals<sup>1</sup> that the offense of kidnapping, in violation of Colorado statutes, is also an offense under the Uniform Code of Military Justice.<sup>2</sup> The opinions in these cases focused the attention of military lawyers on general considerations of kidnapping as an offense triable before military courts under military law.

Although such offenses at one time had been prosecuted under the Articles of War,<sup>3</sup> this was the first conviction under the Uniform Code of Military Justice. There can be little doubt that such offenses have occurred since enactment of the Code. That they were not tried as kidnapping was probably because they involved other offenses which were proscribed, either specifically or by custom, by military law and because of the lawyer's natural reluctance to face appellate tribunals on new issues when old principles, perhaps somewhat inadequate but already tested in the appellate crucible, are available for use.

Whatever may have been the reason for disinclination of the military to make use of the various legislative enactments against kidnapping, it has been overcome. The wall having been breached, a second case<sup>4</sup> has followed the first into the field and together they appear to have established a firm foothold in military criminal law.

It is the purpose of this article generally to discuss the nature of this new tool of military law—its background, its future, its uses,

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\*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Tenth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other government agency.

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<sup>1</sup>United States v. Picotte, 12 USCMA 196, 30 CMR 196, and United States v. Wright, 12 USCMA 202, 30 CMR 202 (1961).

<sup>2</sup>Art. 134, UCMJ ; 10 U.S.C. § 934 (1958).

<sup>3</sup>See *e.g.*, CM 212505, Tipton, 10 BR 237 (1939) ; CM 328876, Mullarkey, 77 BR 247 (1948).

<sup>4</sup>See United States v. Harkcom, 12 USCMA 257, 30 CMR 257 (1961).

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and its limitations. What is intended is not an exhaustive study of the offense, but rather a base upon which the practicing military attorney can build.

## II. HISTORY OF THE OFFENSE

### A. GENERAL

In the early societies, slavery was a predominant institution, and kidnapping was linked to slave trade. With the rise of feudalism, the nature of the offense changed and only with the growth of capitalism has the offense we commonly think of as kidnapping come into being.

Although man has always seized and made off with his brethren for one reason or another, there is no common thread by which one historical form of the offense may be linked to another except that of human greed.

### B. THE HEBREW LAW

In the Hebrew law "manstealing" was a capital offense.<sup>5</sup> However, the proscription was somewhat limited in its application, having as its object protection of Hebrews from being stolen from their homes and enslaved.<sup>6</sup> By its terms, the prohibition applied only to the taking of Hebrews. Capture and enslavement of members of other nations were not proscribed.

Presumably, the head of a household could sell his own sons and daughters with impunity,<sup>7</sup> and the one sold was bound to service subject to certain laws governing treatment and length of service.<sup>8</sup>

It may be concluded that the prohibition against "manstealing" did not apply to the stealing of women. As other laws dealing with servitude refer expressly to male and female,<sup>9</sup> the omission of the female from the protection of this earliest of kidnapping laws was apparently intentional.

### C. BABYLONIAN LAW

The law of Babylon, set forth in the famous Code of Hammurabi,<sup>10</sup> provided that :

If a man steal a man's son, who is a minor, he shall be put to death."

<sup>5</sup> Exodus 21 :16; Deuteronomy 24:7.

<sup>6</sup> Deuteronomy 24:7, "If a man be found stealing any of his brethren of the children of Israel, and maketh merchandise of him, or selleth him; then that thief shall die; . . ."

<sup>7</sup> Exodus 21:7.

<sup>8</sup> *Id.*, verses 2 through 11.

<sup>9</sup> *Id.*, verses 22, 26 through 32.

<sup>10</sup> HARPERS, THE CODE OF HAMMURABI, KING OF BABYLON, ABOUT 2250 B.C., (1904).

<sup>11</sup> *Id.*, at 17.

The precise meanings of the terms used are not clear, as they have been variously translated.<sup>12</sup> However, it is evident that kidnapping was considered a form of larceny<sup>13</sup> and that the law was limited in its application.<sup>14</sup> Students of ancient laws believe the basic evils aimed at were enslavement of free men<sup>15</sup> and interference with feudal rights.<sup>16</sup>

## D. GROWTH OF ROMAN LAW

If Rome was not built in a day, neither were her laws relating to the offense of kidnapping. In Hebrew and Babylonian law the offense was early crystallized by a sovereign pronouncement but in Rome the law ebbed and flowed, developing through the centuries of Rome's power and gaining refinements along the way.

Members of the Roman household—the wife, the children, and the slaves—were subject in varying degrees to the power of the head of the household.<sup>17</sup> In early Roman law, kidnapping was a civil offense in the nature of larceny. The gist of the offense was not theft of property, as in Babylonian law, but interference with the power of the head of the household, and was actionable by him as a private wrong sounding in tort.<sup>18</sup> Even after the criminal aspect of the offense was recognized, it was linked to the institution of slavery<sup>19</sup> and teetered uncertainly between crime and tort for many years.<sup>20</sup> It appears more laws providing methods and means for recovery of kidnapped persons<sup>21</sup> were enacted than were ever enacted to deal directly with the offense itself.

With the growth of Roman law into an advanced legal system, the criminal aspect of kidnapping emerged as the dominant consideration. Early enactments in this field punished the offense by money fines.<sup>22</sup> It was not until the natural law theories of individual freedom entered

<sup>12</sup> DRIVER & MILES, *THE BABYLONIAN LAWS*, 105 (1952).

"HARPER, *op. cit. supra*, note 10, at 13-18.

"The translation accepted by DRIVER AND MILES (*op. cit. supra*, note 12) is, "If a man steal the young son of a **free** man he shall be put to death." This would exclude the stealing of slaves and females. Other sections of Hammurabi's Code indicate exclusive use of the masculine gender in this section was intentional.

<sup>15</sup> The section is located in that part of the code dealing with stealing and slavery.

<sup>16</sup> DRIVER & MILES, *op. cit. supra*, note 12, at 105.

"Lardone, A Note on *Playguim*, 1 U. DET. L.J. 163 (1932). See also GAIUS, *ELEMENTS OF ROMAN LAW*, 46 (2d ed. Poste Transl. 1875).

<sup>18</sup> GAIUS, *INSTITUTES*, 3, 199, DEZULUETA, *THE INSTITUTES OF GAIUS*, Part 11, 205 (1953); BUCKLAND, *A TEXTBOOK OF ROMAN LAW*, 103 (1950).

<sup>19</sup> CHERBY, *THE GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES*, 75 (1890).

<sup>20</sup> Lardone, *supra*, note 17, at 167.

<sup>21</sup> *Id.*, at 165-167.

<sup>22</sup> See MAINE, *ANCIENT LAW*, 323 (1905).

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the law that more severe punishments, sometimes extending to death,<sup>23</sup> were authorized.

Humanitarian considerations in connection with the offense had become well rooted in Roman law by the time of the Emperor Constantine, who expressed deep concern for the parents of kidnapping victims and specified that a convicted kidnapper, if a slave, was to be exposed to wild beasts or, if a free man, slain with no privilege of rank considered.<sup>24</sup>

### E. BRITISH COMMON LAW

Despite Fortescue's assertion that the laws and customs of England had remained unchanged since the earliest times as proof that they were "above all exception good,"<sup>25</sup> the offense of kidnapping did not make an early appearance among them. Even false imprisonment, the only offense of this nature known to early common law, was not mentioned by Glanville, writing about 1189.<sup>26</sup>

False imprisonment first appears in a reported case of about the year 1202.<sup>27</sup> This offense was a felony, and thus the subject of an appeal of felony, exposing the complainant to the dangers of trial by battle. Undoubtedly, that risk deterred many would-be complainants, accounting for the dearth of reported cases during the thirteenth century.<sup>28</sup> Late in that century, the rise of the writ of trespass afforded a safer, if milder, remedy. Although false imprisonment was still regarded as a felony it apparently was more often treated as a misdemeanor,<sup>29</sup> under the writ, and at the end of the century Britton gave the following very practical advice concerning the offense :

**Appeals of felony may also be brought for wounds, and for imprisonment of freemen, and for every other enormous trespass; but for avoiding the perilous risk of battle it is better to proceed by our writs of trespass than by appeals."**

Exactly when kidnapping became a separate offense is not clear, but we find Blackstone referring to the offense by name as a misdemeanor which he defined as :

<sup>23</sup> Lardone, *supra*, note 17, at 170.

<sup>24</sup> *Id.*, at 171; ALLEN, *THE EVOLUTION OF GOVERNMENTS AND LAWS*, 340 (1916).

<sup>25</sup> FORTESCUE, *COMMENDATION ON THE LAWS OF ENGLAND*, 27 (Grigor's Transl., 1917).

<sup>26</sup> See GLANVILLE, *A TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND* (Woodbine Ed., 1932).

<sup>27</sup> *Gering v. Cook* (Lincolnshire Eyre, 1202), Selden Society, *Select Pleas of the Crown*, at 18 (1887).

<sup>28</sup> Aickin, *Kidnapping at Common Law*, 1 *RES JUDICATAE* 130 (1936).

<sup>29</sup> See POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW*, 509 (1899).

<sup>30</sup> BRITTON, 103 (Nichols Transl., 1901).



the forceable abduction **or** stealing away **of** a man, woman, or child, from their own country, and sending them into another . . . .<sup>31</sup>

Most courts and writers have followed this definition.

The offense commonly thought of today as kidnapping bears some characteristics of certain types of false imprisonment, a felony described by Blackstone as sending any British subject "a prisoner into parts beyond the seas" or carrying one by force out of the four northern counties or holding him within said counties to "ransom him or make spoil of his person or goods."<sup>32</sup> However, these aspects of the offense were rooted in the law against banishment or transportation, as punishment, of a British subject and not in deprivation of liberty.

### F. EARLY HISTORY IN AMERICA

The law of kidnapping took varying forms and provided punishments of varying severity in the American colonies. The enactment—or lack of them—of colonial governments probably reflect the influences of puritanism and the consequent regard in which the colonists held the institution of slavery. Thus, a Massachusetts law of 1646 provided that ". . . [I]f a man stealeth a man, or mankind, he shall surely be put to death."<sup>33</sup> Other colonies had less severe statutes or followed the common law.<sup>34</sup> In the later colonial and post revolutionary periods, there was a general return to the common law concept,<sup>35</sup> often modified to require only an intent to carry the victim out of his own state (ascontrasted to country).

### G. UNITED STATES, 1800 TO 1932

During the nineteenth century, comparatively few kidnapping cases were tried. This probably is not an indication of the number of offenses committed, but rather of failure to report offenses and primitive police methods.<sup>36</sup> In the early part of the century, two cases appear. One of these resulted from an attempt to sell a negro boy in a free state<sup>37</sup> and the other from a youngster's desire to find adventure on the high seas and a ship captain's willingness to assist.<sup>38</sup> The first was tried under common law and the second under a statute substantially repeating the common law.

<sup>31</sup> BLACKSTONE, COMMENTARIES 218.

<sup>32</sup> *Ibid.*

<sup>33</sup> See *State v. Rollins*, 8 N.H. 550 (1837).

<sup>34</sup> See *Davenport v. Commonwealth*, 1 Leigh 588 (Va. 1829).

<sup>35</sup> See *Campbell v. Rankin*, 11 Me. 103 (1833); *State v. Rollins*, 8 N.H. 550 (1837).

"See Fisher & McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U.L. REV. 646 (1935).

<sup>37</sup> *State v. Rollins*, 8 N.H. 550 (1837).

<sup>38</sup> *Campbell v. Rankin*, 11 Me. 103 (1833).

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Most of the states enacted kidnapping statutes during the first half of the 19th century. Some of these early statutes were openly directed at slave trade, but most simply modified the common law by prohibiting kidnapping with intent to remove the victim from the state or to hold him captive within the state. Kidnapping for ransom was not expressly prohibited and punishments were mild in comparison to those generally provided today.<sup>39</sup> A federal kidnapping act, enacted in 1886,<sup>40</sup> related only to slavery.

In 1874, the ransom kidnapping of Charles Brewster Ross, the four-year-old son of a well known resident of Philadelphia, and the exchange of correspondence with the kidnappers over a period of four months attracted national attention.<sup>41</sup>

Nothing worthy of further note occurred in the field until 1900 when the kidnapping of Edward Cudahay, son of the packer, and a demand for twenty-five thousand dollars ransom caused a brief ripple in otherwise placid waters.<sup>42</sup>

The twentieth century, before World War I, was merely a continuation of the *status quo*. After the war, the rich fields of criminal activity, opened by prohibition, greatly increased the popularity of criminal endeavor. In addition, improvements in transportation made interstate kidnapping feasible and relatively safe. Rapid movement of the victim out of the state in which taken often, perhaps usually, foiled capture as police in that state could not reach the offenders and those of the terminal state frequently had too many problems of their own to spend much time on a crime they considered to have occurred elsewhere.

The business of kidnapping prospered. In 1919, Alexis Stockburger, eleven years old, was taken from the Cathedral Academy in Albany and never heard of again. In 1920, Blakely Coughlin, thirteen months old, was taken from his home in Morristown, Pennsylvania, and never found. In 1924, the notorious kidnapping and murder of Bobby Franks by Leopold and Loeb occurred. In 1927, Marion Parker, daughter of a Los Angeles banker, was kidnapped and murdered. In 1928, William Ranieri was kidnapped in Chicago and a ransom of sixty thousand dollars demanded. In 1929, Gill Jamieson was kidnapped and killed in Honolulu.<sup>43</sup>

This situation prompted widespread revision of state statutes. During the years following World War I, statutes expressly proscribing kidnapping for ransom or reward became common. How-

<sup>39</sup> Information compiled by examination of legislative enactments of the states throughout the nineteenth century.

<sup>40</sup> Act of May 21, 1886, REV. STAT. 5525 (1875). See 18 U.S.C. § 1583 (1958).

<sup>41</sup> FISHER & MCGUIRE, *supra*, note 36, at 649.

<sup>42</sup> *Id.*, at 650.

<sup>43</sup> See FISHER & MCGUIRE, *supra*, note 36, at 651.

ever, the good intentions of state legislators continued to be frustrated by the state lines and kidnapers continued to prosper.

In 1931, two members of Congress were moved to action. Senator Patterson and Representative Cochran, both from Missouri, introduced bills designed to prohibit interstate transportation of kidnapped persons. The hearings on the Cochran Bill produced not only squabbles and haggling about states' rights but some astounding information. Nearly one thousand law enforcement officials in five hundred cities reported that during a brief period there had been a total of two hundred and seventy-nine reported offenses. Forty-four victims, of whom thirteen were later killed, were known to have been taken across state lines. Although it was estimated two thousand offenders were involved, only sixty-nine had been convicted. Ransoms as high as one hundred and twenty-five thousand dollars had been demanded in the known cases and it was estimated there had been some eight hundred unreported offenses.<sup>44</sup>

While the embryonic efforts of Messrs. Patterson and Cochran were struggling, apparently in their death throes, the Lindbergh kidnapping occurred. Congress took up arms and leaped to the fore. The House reconsidered the Cochran Bill. Meanwhile, the Senate passed a new bill which became the famous "Lindbergh Law."<sup>45</sup>

The original act merely prohibited interstate transportation of kidnapped persons and fixed the punishment at ". . . such term of years as the court, in its discretion, shall determine."<sup>46</sup> In 1934, the act was amended to provide for the death penalty of certain cases, to raise a presumption of interstate transportation if the victim had not been released within seven days, and to exempt a parent who kidnaps his minor child.<sup>47</sup> In 1948, an amendment added the penalty of imprisonment for life, which had not previously been provided in express terms. Receiving, possessing, or disposing of ransom money was also proscribed.<sup>48</sup> The final amendment, in 1956, reduced to twenty-four hours the period necessary to raise the presumption of interstate transportation.<sup>49</sup>

State legislatures did not remain idle. At the time of the Lindbergh crime, every state had one or more kidnapping statutes but only six provided a capital sanction. Following the Lindbergh case, most added the penalty of death, usually in connection with kidnapping for ransom or reward.<sup>50</sup>

<sup>44</sup> 75 *Cong. Rec.* 13282-13304 (1932); FISHER & MCGUIRE, *supra*, note 36, at 653.

<sup>45</sup> *Id.*, at 655.

<sup>46</sup> Act of June 22, 1932, ch. 271, §§ 1, 3, 47 Stat. 326.

<sup>47</sup> Act of May 18, 1934, ch. 301, 48 Stat. 781.

<sup>48</sup> Act of June 25, 1948, ch. 645, 62 Stat. 760.

<sup>49</sup> Act of August 6, 1956, ch. 971, 70 Stat. 1043.

<sup>50</sup> See 19 ORE L. REV. 301 (1940).

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## III. PRESENT FEDERAL LAW

The collection of congressional enactments now generally referred to as "The Federal Kidnapping Act" (and hereinafter referred to by that term or simply as "the act") is as follows :

(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, **or** carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall **so** recommend, **or** (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

(b) The failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away shall create a rebuttable presumption that such person **has** been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one **or** more of such persons do any overt act to effect the object of the conspiracy, each shall be punished as provided in subsection (a).<sup>51</sup>

A further section<sup>52</sup> punishing receipt, possession, or disposal of ransom money may be of interest in a particular case, but is omitted here as being beyond the scope of this discussion.

### A. TERMINOLOGY

As the meaning and scope of the terms used in a statute are, or ought to be, of primary importance in construing the statute, an examination of the terms used in the Federal Kidnapping Act is appropriate.

*"Knowingly."* The Act pertains to persons who "knowingly" do certain things. That actual knowledge of some facts is required appears not to have been questioned. Of what facts the defendant must have had knowledge is the question that has caused such difficulty as there has been. Every case has held, directly or by implication, that actual knowledge of the unlawful taking of the victim is essential. However, there is a division on the issue whether knowledge of the interstate commerce feature is necessary. The first court before which the issue was raised held that if a state line is crossed in the course of the offense, intent to cross it, or knowledge that it has been crossed are immaterial.<sup>53</sup> A second court, in a later case, held that the requirement of knowledge extends to this feature of the

<sup>51</sup> 18 U.S.C. § 1201 (1958).

<sup>52</sup> 18 U.S.C. § 1202 (1958).

<sup>53</sup> United States v. Powell, 24 F. Supp. 160 (E.D. Tenn., 1938).

offense.<sup>54</sup> The same requirement of knowledge was enunciated by still another court in a recent case with the modification that it is not necessary that the offender know exactly when or where he crossed a state line so long as he is aware that he has done so at some point between the inception of his journey and its termination.<sup>55</sup>

This question can be argued either way with some force. The argument for not requiring knowledge is buttressed, to some extent, by the many cases involving taxation and regulation, in which courts have decided that a particular course of action does or does not constitute interstate commerce with little or no regard for knowledge or intent of the parties. However, construction of civil statutes and of criminal statutes are two entirely different things, governed by different principles. The axiom that a criminal statute must be strictly construed is too well known to merit discussion. Furthermore, the word "knowingly," appearing as it does immediately before the words "transports in interstate or foreign commerce," in the Federal Kidnapping Act, appears inescapably to require knowledge of the interstate movement. The evil aimed at by the act is frustration of pursuit by deliberate crossing of state lines. This construction places little added burden on the government as the cases discussed above make it clear that the term "interstate commerce" refers only to the fact of crossing a state line.

*Words Defining the Taking.* The words "seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away" appear to have been used in their ordinary meanings, and definitions are almost non-existent in federal cases. State courts have dealt with some of these terms and there appears no reason to suppose their definitions would not be acceptable in the federal courts. Thus, the word "confined" has been held to denote any physical restriction of movement and one may be confined in a moving automobile;<sup>56</sup> "decoyed" refers to suggestions, representations, solicitations, or inducements by which the assent of the victim is procured;<sup>57</sup> "inveigled" carries an idea of deception for accomplishment of an evil purpose;<sup>58</sup> and "kidnapped" refers to carrying a person away by unlawful force or fraud and against his will or seizing or detaining him for that purpose.<sup>59</sup> Some courts have

<sup>54</sup> *Wheatley v. United States*, 159 F. 2d 599 (4th Cir., 1946).

<sup>55</sup> *Eidson v. United States*, 272 F. 2d 684 (10th Cir., 1959).

<sup>56</sup> *People v. Bishop*, 1 Ill. 2d 60, 114 N.E. 2d 566 (1953).

<sup>57</sup> *Gould v. State*, 71 Neb. 651, 99 N.W. 541 (1904).

<sup>58</sup> *State v. Lacoshus*, 96 N.H. 76, 70 A. 2d 203 (1950); *State v. Rivers*, 84 Vt. 154, 78 A. 786 (1911).

<sup>59</sup> *State v. Myers*, 154 Kan. 648, 121 P. 2d 286 (1942); *State v. Dorsett*, 245 N.C. 47, 95 S.E. 2d 90 (1956).

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required movement of the victim<sup>60</sup> but that issue is moot in federal law as the interstate commerce feature necessitates movement. The words "seize" and "detain" do not necessarily imply application of actual force, the threat of force being sufficient.<sup>61</sup>

*"Ransom or Reward."* It is not clear whether federal law distinguishes these terms or exactly what significance is attached to them. The indictment, of course, describes the purpose or purposes of the alleged kidnapping and leaves to the court or jury the task of determining whether the described purpose constitutes a "ransom or reward or otherwise." There is some indication that the terms ransom and reward may simply indicate any benefit or prospective benefit to the offender, but the broadsweep of "otherwise" is always so tempting that courts find it unnecessary to define "ransom" and "reward."<sup>62</sup> Certainly, money has always been considered ransom, and it may be that anything capable of valuation in terms of money is either a ransom or a reward. As a practical matter, precise definitions are unnecessary, the catch-all of "otherwise" being always ready to absorb any doubtful purpose.<sup>63</sup>

*Purposes Embraced by the Word "Otherwise."* As indicated above, inclusion of the words "or otherwise" among the purposes of the offense has provided an easy method of resolving cases which might be doubtful or clearly not included under the terms "ransom" and "reward." Scarcely a case can be imagined which does not fall within the inclusions of "otherwise." A court has said the term ". . . includes any object of a kidnapping which the perpetrator might consider of sufficient benefit to himself to induce him to undertake it."<sup>64</sup> In that case, the victim was taken and held for the purpose of "inducing" him to confess the Lindbergh kidnapping. The confession was to be submitted in connection with Bruno Hauptmann's petition for pardon and used as the basis for a news story which, it was anticipated, would enhance the reputation of one of the kidnappers as a private investigator, causing his services to be in great demand. The court indicated that the purpose of submitting the confession in connection with the Hauptmann case might alone have been sufficient, but the case was not decided on that basis. However, this dictum leads

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<sup>60</sup> *People v. Chessman*, 52 Cal. 2d 467, 341 P. 2d 679 (1959); *Midgett v. State*, 216 Md. 26, 139 A. 2d 209 (1958); *State v. Taylor*, 70 N.D. 201, 293 N.W. 219 (1940).

<sup>61</sup> *United States v. McGrady*, 191 F.2d 829 (7th Cir., 1951).

<sup>62</sup> See *Gooch v. United States*, 297 U.S. 124 (1936); *Dawson v. United States*, 292 F. 2d 366 (9th Cir., 1961); *Parker v. United States*, 103 F. 2d 857 (3d Cir., 1939), *cert. denied* 307 U.S. 642 (1939).

<sup>63</sup> *Gooch v. United States*; *Dawson v. United States*; *Parker v. United States*; *supra*, note 62.

<sup>64</sup> *Parker v. United States*, 103 F. 2d 857 (3d Cir. 1939), *cert. denied*, 307 U.S. 642 (1939).

one to wonder whether the anticipated benefit might run to someone other than the kidnapper. The question is unanswered, as in all cases some benefit to the perpetrator of the offense has been found. It may well be that the mere mental satisfaction of having benefitted another would be considered sufficient benefit to the offender if a court were required to go that far. Purposes which have been held sufficient to satisfy the "otherwise" requirement, in addition to the one described above, are robbery,<sup>65</sup> rape,<sup>66</sup> prevention of apprehension for a concurrent or previous crime,<sup>67</sup> prostitution of the victim,<sup>68</sup> and flogging.<sup>69</sup>

It would appear that the "or otherwise" category in the Federal Kidnapping Act is all-inclusive and that a definition, under a state statute, given by the Supreme Court of South Dakota, may be applied equally in federal law: "'or otherwise' extends to restraint for any purpose."<sup>70</sup>

But, however nebulous or abstract a purpose may be and still satisfy the requirement of the statute, it is clear that the acts of the defendant must have been done for a specific purpose. Furthermore, it must be alleged in the indictment and proved beyond a reasonable doubt by the evidence."

## B. WHEN MUST THE PURPOSE EXIST?

Must the purpose exist in the mind of the offender at the time of the taking? Or, put differently, must the taking be done with a concurrent intent to hold the victim for a purpose proscribed by the statute? Initially, recourse may again be had to the wording of the Federal Kidnapping Act itself. In discussing the requirement of knowledge, it was noted that the word "knowingly" appears immediately before the phrase "transports in interstate or foreign commerce," thereby appearing to relate directly to the latter phrase (and we have seen that this is the preferred construction). The words of the act denoting purpose are similarly preceded by the word "held." As to this relationship, the act reads, "Whoever knowingly transports in interstate . . . commerce, any person . . . unlawfully seized, confined,

<sup>65</sup> Sanford v. United States, 169 F. 2d 71 (8th Cir., 1948).

<sup>66</sup> Poindexter v. United States, 139 F. 2d 158 (8th Cir., 1943).

<sup>67</sup> Gooch v. United States, 297 U.S. 124 (1936) (previous crime); Casebeer v. United States, 87 F. 2d 668 (10th Cir., 1937) (concurrent crime).

<sup>68</sup> United States v. Bazzell, 187 F. 2d 878 (7th Cir., 1951), cert. denied, 342 U.S. 849.

<sup>69</sup> Brooks v. United States, 199 F. 2d 336 (4th Cir., 1952).

<sup>70</sup> State v. Strauser, 75 S.D. 268, 63 N.W. 2d 345 (1954); accord, Brooks v. United States, *supra* note 69. Compare Gooch v. United States, 297 U.S. 124 (1936); Dawson v. United States, 292 F. 2d 366 (9th Cir., 1961) (dictum).

"United States v. Bazzell, 187 F. 2d 878 (7th Cir., 1951), cert. denied, 342 U.S. 848. But see Dawson v. United States, *supra* note 70 (dictum) (no purpose necessary).

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inveigled, decoyed, kidnapped, abducted, or carried away *and held* for ransom or reward or otherwise . . ." (emphasis added). Thus the word "held" may be construed to bear a direct relation to the words denoting purpose and, because of the use of the conjunction, only to those words. Thus construed, the reference is to the purpose of the holding and not to the purpose of the taking.

In practice this question will seldom arise as the offender will have a definite purpose, susceptible of proof, as his motive for taking the victim, and the entire course of the offense, including the holding, will be governed by that motive or purpose. However, there may arise the case in which the victim is initially taken for one purpose but subsequently held for another. There can be imagined, for example, a case in which a victim is taken for the purpose of compelling a sexual act but is later held for ransom, or a case of taking for ransom in which the offender is forced, perhaps by threat of imminent capture, to abandon his original design, but holds the victim as a hostage to insure escape.

This particular problem has been touched upon by two federal courts. In one instance it was said to be immaterial that the initial purpose might be confused or uncertain so long as the evidence shows that one of the purposes for which the victim was held coincides with a purpose alleged in the indictment.<sup>72</sup> In the other instance the elements of the offense were generally stated to be an unlawful seizure, a holding for a specific purpose, and interstate transportation of the victim.<sup>73</sup> Thus, the courts appear to have adopted the construction suggested above. This construction will not necessarily apply to a prosecution under the law of a state.<sup>74</sup>

### C. OTHER OFFENSES

Although beyond the strict scope of this work, it is well to note in passing that if a victim is kidnapped and held for the purpose of committing a further act which is itself denounced by statute the offender may usually be tried and punished for both offenses. Thus, in a case of an interstate kidnapping for the purpose of committing rape on the victim, the offender may be tried for violations of both the Federal Kidnapping Act and the Mann Act,<sup>75</sup> and in a kidnapping to compel transportation into another state he may be tried for kidnapping and interstate transportation of a stolen motor vehicle.<sup>76</sup>

<sup>72</sup> *United States v. Baker*, 71 F. Supp. 377 (W.D. Mo., 1947).

<sup>73</sup> *United States v. Bazzell*, 187 F. 2d 878 (7th Cir., 1951), *cert. denied*, 342 U.S. 848.

<sup>74</sup> See notes 139, 110, 111, 140, *infra*, and text accompanying.

<sup>75</sup> *Poindexter v. United States*, 139 F. 2d 158 (8th Cir., 1943); 18 U.S.C. § 2421 (1958).

<sup>76</sup> *Roper v. United States*, 194 F. 2d 1012 (4th Cir., 1952).



D. *CONSENT*

In a prosecution under the Federal Kidnapping Act, consent of the alleged victim is a defense if the victim was competent to consent and the consent was not procured by unlawful means.<sup>77</sup> If it appears the victim has consented, it is incumbent upon the prosecution to prove lack of capacity to consent beyond a reasonable doubt.<sup>78</sup>

There is no hard and fast criterion by which incapacity may be shown. A child of tender years is presumed incapable of consent,<sup>79</sup> but the dividing line between tender years and age of capability is shadowy. An eleven-year-old girl has been held capable of withholding her consent (and therefore, presumably, capable of giving it).<sup>80</sup>

As the indictment must allege and the proof show beyond a reasonable doubt that the acts charged against the defendant were done against the will and without the consent of the victim, if the victim is incompetent to consent, then it must be alleged and proved that the acts were done against the will and without the consent of the victim's parents or guardian, and if the victim has, in fact, consented, incompetence must be proved beyond a reasonable doubt.<sup>81</sup>

E. *THE PARENTAL EXCEPTION*

Subsection (a) of the Federal Kidnapping Act expressly excepts from its proscription the kidnapping of a minor "by a parent thereof." Whether this is an unqualified exception has not been decided. Before enactment of the statute under consideration, the general rule was that a parent could not be guilty unless custody of the minor child had been vested exclusively in the other parent by decree of a competent court.<sup>82</sup>

It may be argued, on the one hand, that a parent who has been lawfully denied any right of custody is in no better position than a stranger and may be guilty of the offense. This argument might have some validity if the child is taken for a purpose not arising out of the relationship, as, for example, ransom or immoral acts. However, the impossibility of drawing any line of definition based directly on purpose must be at once apparent. How can one say one purpose is criminal while another is not when both fall within the proscriptions of the statute?

<sup>77</sup> *Gooch v. United States*, 297 U.S. 124 (1936).

<sup>78</sup> *Chatwin v. United States*, 326 U.S. 455 (1946).

<sup>79</sup> *Id.*, at 460.

<sup>80</sup> *Eldson v. United States*, 272 F. 2d 684 (10th Cir., 1959); cf. *Chatwin v. United States*, 326 U.S. 455 (1946).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Hard v. Splain*, 45 App. D.C. 1 (1916).

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It appears far more reasonable to conclude that the statute makes no such distinction and that permitting a custody decree to subject to a death penalty one who would not otherwise be subject thereto is irrational.

Application of the parental exception to a particular fact situation can be complicated by another more complex problem into which the one discussed above may merge. That is the question, who is a parent? What are the minimum requirements of relationship which will qualify a defendant to claim this exemption from the proscriptions of the statute? One might assume that a natural parent would certainly qualify if no custody decree is involved and, as indicated above, should qualify ever, in the face of a decree. The danger of this unqualified assumption can be best emphasized by reference to a case in which the question, who is a parent, was considered subjectively.

*M*, the mother of a fifteen-year-old, illegitimate daughter, married *E*, who was not the putative father of the girl. The daughter lived with *M* and *E* four months, then was married, with the consent of *M*, and established her own home. Some time later, *M* and *E* went to the home of the daughter in another state and, representing to her that her grandfather was critically ill, induced her to return with them. The daughter was taken to the home of *M* and *E* where she was held in involuntary servitude. At his trial for kidnapping, *E* claimed the parental exemption, but the court held that, under the circumstances shown, *H* was not a parent.<sup>83</sup>

This holding was based, not on the single fact that *E* was neither the natural nor the adoptive father, but on the entire circumstances of the existing relationship. The opinion clearly implies that under other circumstances *H* could have qualified as a parent of the victim and, in fact, recognizes (though as dictum) that one standing *in loco parentis* could claim the benefit of the exception.<sup>84</sup>

Certainly, the existence of a natural or adoptive relationship should furnish the strongest evidence of qualification to claim the exemption. However, if one who is not a natural or adoptive parent can gain an equivalent relationship, is it not reasonable to assume that one who has such a relationship, however acquired, can lose it?

If these ideas be accepted as accurate, can we not formulate a general definition of the word "parent" to be used by the courts in determining a defendant's qualification to claim exemption from the statute? Such a rule might provide that if the defendant is (a) a natural or adoptive parent or a guardian of the person of the alleged victim, or (b) is a person standing *in loco parentis* thereto, provided that at the time of the alleged offense, there had existed for an appreciable

<sup>83</sup> *Miller v. United States*, 123 F.2d 715 (8th Cir., 1941).

<sup>84</sup> See *Id.*, at 717.

time such a relationship between the defendant and the alleged victim **as** normally exists between parent and child, the defendant is a **parent of** the alleged victim within the meaning of the statute. Further, if either **of** the relationships described in (a) or (b) has existed in the past, its continued existence will be presumed in the absence of a **showing** that the defendant has, by word or act, unequivocally repudiated it.

The suggested rule leaves many questions unresolved, but they have now become questions of fact to be resolved by the jury under the guidance of the rule. The idea, expressed in the last sentence of the suggested rule, that a natural or adoptive parent may repudiate the relationship without the intervention of a court may be, at first glance, shocking to some. But if a parent takes and carries away his child for a purpose which is clearly antagonistic to the parent-child relationship, is there any valid reason for permitting him to take refuge in the relationship he has violated? Assume the case in which a father has abandoned his family and avoided his obligations of support and comfort for a period of years. **If** he returns and takes his own minor child for the sole purpose of compelling payment of ransom by the mother, should he be allowed to escape prosecution on the ground that he is a parent?

Adoption of the proposed rule would give effect to the intent **of** Congress, as suggested by the courts which have referred to the parental exception:

**The words "except, in the case of a minor, by a parent thereof" emphasizes the intended result of the enactment. They indicate legislative understanding that in their absence a parent, who carried his child away because of affection, might subject himself to condemnation of the statute.<sup>85</sup>**

**The records of the domestic relations courts throughout the Nation are replete with instances where, when domestic difficulty arises, parents, because of affection for their children, inveigle or spirit them away . . . . It may be that Congress was primarily concerned with this class of cases when the exception was framed.<sup>86</sup>**

At the same time, the arbitrary extremes of permitting a parent to take his child for evil purposes in the absence of a custody decree, yet punishing him as a criminal when there is such a decree, though his intentions were born of deep affection would be avoided. Certainly, we cannot say one is not a parent simply because he does not bear the natural or adoptive relationship. Must we say he is a parent simply because he does bear such relationship?

## F. *TEE MEANING OF "LIBERATED UNHARMED"*

Under the Federal Kidnapping Act, the death penalty may be imposed if the victim "has not been liberated unharmed and if the

<sup>85</sup> *Gooch v. United States*, 297 U.S. 124, 129 (1936).

<sup>86</sup> *Miller v. United States*, 123 F. 2d 715, 716 (8th Cir., 1941).

verdict of the jury shall so recommend." The word "unharméd" refers to the time of liberation of the victim and the harm must exist at that time. It is immaterial that the victim was injured in the course of the kidnapping if the injury has healed when he is liberated.<sup>87</sup>

At first blush the thought that a kidnapper may injure his victim at will and incur no added penalty if the injury heals before the victim is released is repugnant. A federal court has explained it in this language :

Any other construction would, it seems to us, tend to encourage the murder of the victim . . . if in the course of the kidnapping he had been injured. Congress must have preferred . . . "a cured and live victim to a dead or permanently injured one, even if the kidnappers must refrain from liberating until the cure is accomplished."<sup>88</sup>

The last sentence quoted appears to have been in answer to criticism that this view would encourage kidnappers to hold their victims for long periods while awaiting healing of injuries. The court's reasoning appears correct when viewed in the light of circumstances leading to enactment of the Federal Kidnapping Act. Examination of the known kidnappings in which victims had been killed or released injured shows that in the vast majority the death or injury was caused deliberately rather than by misadventure. It is logical to assume the Congressional intent was to discourage this deliberate injury and killing.

As to the degree of injury required, neither the cases nor the legislative history of that portion of the act is of any real assistance. The Supreme Court has apparently recognized that certain minor injuries may not be classified as "harm," but the extent of the recognition is questionable. The court said, "It may be possible that some types of injury would be of such trifling nature as to be excluded from the category of injuries which Congress had in mind."<sup>89</sup> Considering the nature of the crimes which prompted Congressional action it would appear that there certainly must be the types of injury of which the court spoke, but what they may be is an open question.

## IV. STATE LAWS

### A. GENERAL

No attempt is made in this article to present a detailed study of the law in each state, as a tabulation of the laws of fifty separate jurisdictions, interpreting hundreds of varying statutes, would be a monumen-

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<sup>87</sup> *Parker v. United States*, 103 F. 2d 857 (3d Cir., 1939), cert. denied, 307 U.S. 642 (1939) ; cf. *Robinson v. United States*, 324 U.S. 282 (1946).

<sup>88</sup> *Parker v. United States*, supra note 87, at 861.

<sup>89</sup> *Robinson v. United States*, 324 U.S. 282 (1945).

tal task, filling many volumes, and is best left to the digests and encyclopedias.

However, as the laws of a state proscribing and punishing kidnapping become federal law on a federal enclave located within the state and may be tried in a military court in certain instances,<sup>90</sup> the basic elements of state kidnapping law must be examined.

## B. TERMINOLOGY AND CONSTRUCTION

These terms used in state kidnapping statutes vary widely. They often appear quite restrictive, but courts have generally adopted constructions which broaden the statute to give it the desired coverage. Courts seldom state the basic principles by which the statutes are construed, but it is clear that the usual rule of strict construction of criminal statutes is often not followed. In many cases, the statutes are so drawn that strict construction would leave large gaps in the law and this the courts have not been milling to do. Thus, in a trial under a statute which penalized kidnapping with intent to exact a ransom from relatives or friends of the victim the court said that the word "relative" was used in its generic sense, which "may include . . . every relation that arises in social life," and means a relation in general.<sup>91</sup>

Most courts appear to follow the rule enunciated by a New Jersey court :

. . . [T]hough they [statutes relating to kidnapping] be penal in character and therefore are to be construed against the State, their reasonable intendment is not to be denied.<sup>92</sup>

But despite the seeming clarity of its "reasonable intendment," the same statutory language by no means receives the same construction from the courts of different states.

"*Kidnap*." The outstanding example is the word "kidnap," used in many of the statutes. This word is usually defined in terms of the statute in which it is used, which is no definition at all. An indictment alleging that "A did, on or about such a date, kidnap B" is probably sufficient, as to that element, in every jurisdiction whose statute uses the term, but the pleader would find himself faced with widely varying requirements of proof. Sometimes the word implies asportation of the victim.<sup>93</sup> In some states, a concurrent intent to

<sup>90</sup> See pp. 27-32, *infra*.

<sup>91</sup> See *People v. Grimes*, 35 Cal. App. 2d 319, 329, 95 P.2d 486, 490 (1939).

<sup>92</sup> *State v. Rosenberg*, 30 N.J. Super. 369, 371, 104 A. 2d 849, 850 (1954).

<sup>93</sup> See *People v. Ogden*, 41 Cal. App. 2d 447, 107 P. 2d 50 (1940); *Ex parte Kelsey*, 19 N.J. Misc. 488, 21 A. 2d 676 (Corn. Pl., '1941); *State v. Taylor*, 70 N.D. 201, 293 N.W. 219 (1940). But see, *Sweet v. State*, 218 Ind. 182, 31 N.E. 2d 993 (1941) (kidnapping for ransom not included in requirement); *Brown v. State*, 111 Neb. 486, 196 N.W. 926 (1924).

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take or hold the victim for a particular purpose is required<sup>94</sup> and in others it is not.<sup>95</sup> These features of the definition often do not appear from the statute but the remaining essentials usually do. It may be said that "kidnap" means the seizure or taking of the victim by force, or by any other means enumerated in the statute, in some states with and in others without a specific purpose and, in some states, enticing or carrying away of the victim.

**"Ransom or Reward."** If a statute includes the word "otherwise" among the purposes of the kidnapping it is usually unnecessary to determine what purposes are included within the terms "ransom" and "reward."<sup>96</sup> An exception occurs, in military law, when the statute makes kidnapping for ransom or reward a capital offense while kidnapping for an "otherwise" purpose is not.<sup>97</sup>

"Ransom" usually means something of pecuniary value including money, property, transportation, or any benefit which may be said to have a pecuniary value.<sup>98</sup> "Reward" may include any benefit<sup>99</sup> and may even extend to emotional satisfaction or revenge.<sup>100</sup>

**Other Terms.** The terms used in the Federal Act with respect to the manner of the taking and the purpose are quite generally used with the same meanings in state statutes. Other terms encountered with sufficient frequency to warrant their mention are: "child," which, when not defined in the statute, usually means a person under the age of majority;<sup>101</sup> "detain," which means more than a mere seizure and imports restraint for some period of time;<sup>102</sup> "secretly confined"; and "bodily harm." "Secret confinement" means detention in secret as distinguished from restraint in open view of the public,<sup>103</sup> but one may be secretly confined, for example, in a moving automobile on the public highways.<sup>104</sup> "Bodily harm" usually mean injury, although one court, at least, extended it to any forcible touching against the will of the victim.<sup>105</sup> If the statute does not refer the harm to the time of the victim's release, harm at

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<sup>94</sup> See *Macomber v. State*, 137 Neb. 882, 291 N.W. 674 (1940); *cf. State v. Pudman*, 65 Ariz. 197, 177 P. 2d 376 (1947) (concurrent intent may be proved by later acts).

<sup>95</sup> See *People v. Trawick*, 78 Cal. App. 2d 604, 178 P. 2d 45 (1947).

<sup>96</sup> See *State v. Strauser*, 75 S.D. 266, 63 N.W. 2d 345 (1954); p. 10, *supra*.

<sup>97</sup> *Infra*, pp. 28-30.

<sup>98</sup> See *Sweet v. State*, 218 Ind. 182, 31 N.E. 2d 993 (1941); *cf. Crum v. State*, 131 Tex. Cr. 631, 101 S.R. 2d 270 (1937).

<sup>99</sup> *State v. Andre*, 195 Wash. 221, 80 P. 2d 553 (1938).

<sup>100</sup> *State v. Berry*, 200 Wash. 495, 93 P. 2d 782 (1939) (alternate holding).

<sup>101</sup> See *Wade v. State*, 24 Ala. App. 176, 132 So. 71 (1931) (dictum); *cf. State v. Lacoshus*, 96 N.H. 76, 70 A. 2d 203 (1950) ("minor child").

<sup>102</sup> *Hardie v. State*, 140 Tex. Cr. 368, 144 S.W. 2d 571 (1940).

<sup>103</sup> *Vandiver v. State*, 97 Okla. Cr. 217, 261 P. 2d 617 (1953).

<sup>104</sup> *People v. Bishop*, 1 Ill. 2d 60, 114 N.E. 2d 566 (1953).

<sup>105</sup> *Cf. People v. Brown*, 29 Cal. 2d 555, 176 P. 2d 929 (1947).

any time during the offense will suffice and need not exist at the time of release.<sup>106</sup>

## C. INTENT TO ACCOMPLISH A PARTICULAR PURPOSE

*General.* With respect to the element of intent to accomplish a certain end, kidnapping statutes may be classified into three general categories: (a) those which do not require any such intent; (b) those which require such an intent but under which any intended objective of the act will suffice (here fall the statutes prohibiting kidnapping for "ransom or reward or otherwise"); (c) those which require an intent to accomplish one of several purposes expressly enumerated in the statute. Each of the last two categories may be further divided into two classifications: those which require that the intent exist at the time of the taking and those which do not.

Under statutes of the first major category, it is not necessary that any intent be alleged or proved beyond a general criminal intent.<sup>107</sup> Under the statutes of the second major category, an intent to accomplish some specific end must be alleged and proved, but any intended benefit or purpose of the kidnapping will suffice.<sup>108</sup> Under the statutes of the third type, intent to accomplish one of the purposes set forth in the statute is a necessary element of the indictment and the proof.<sup>109</sup> However, when dealing with statutes of this last type, the courts, in an effort to correct legislative astigmatism, have given to the statutory terms meanings beyond the "legislative intent," the "plain meaning" or any of the other well-worn tests.

As to requirement for concurrence of the taking and the intent, the form of the statute may usually (but not always) be taken as a key. Statutes which recite that "whoever kidnaps, etc., with intent to exact any ransom, reward, etc.," or similar phraseology, may generally be taken as requiring concurrence of the intent with the taking.<sup>110</sup> On the other hand, statutes reading to the effect that "whoever kidnaps, etc., and holds, detains, etc., for the purpose of exacting any ransom, etc.," are usually construed as relating the intent only to the holding and not to the taking.<sup>111</sup>

<sup>106</sup> *People v. Britton*, 6 Cal. 2d 1, 56 P. 2d 494 (1936).

<sup>107</sup> See *State v. Rosegrant*, 338 Mo. 1153, 93 S.W. 2d 961 (1936); *Samson v. State*, 37 Ohio App. 79, 174 N.E. 162 (1930).

<sup>108</sup> See *State v. Taylor*, 82 Ariz. 289, 312 P. 2d 162 (1957); *State v. Strauser*, 75 S.D. 266, 63 N.W. 2d 345 (1954).

<sup>109</sup> See *People v. Bean*, 88 Cal. App. 2d 34, 198 P. 2d 379 (1948); *State v. Brown*, 181 Kan. 375, 312 P. 2d 832 (1957); *Massie v. State*, 153 Tex. Cr. 116, 217 S.W. 2A 1001 (1948).

<sup>110</sup> See *Macomber v. State*, 137 Neb. 882, 291 N.W. 674 (1940); *Massie v. State*, *supra* note 109.

<sup>111</sup> See *People v. Hernandez*, 100 Cal. App. 128, 223 P. 2d 71 (1950); *State v. Leuth*, 128 Iowa 189, 103 N.W. 346 (1905).

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The real difficulty in determining when such intent must exist usually arises from a court's definition of the word "kidnap" as used in the statute. A definition in the terms of the statute, while meaningless as a real definition, at least does not introduce any extraneous ideas. It is the more conscientious (or less wise) court, seeking a definition independent of the statute, which causes trouble. Because one can never know which courts have taken which course, the only source of the information sought is in the decided cases. If the point has not been decided, it is suggested that the statute, itself, is the only reliable guide, though, to be sure, the choice may be bolstered by decisions from other jurisdictions having similar statutes.

*Kidnapping to Commit Another Offense.* Some kidnapping statutes expressly enumerate other offenses as prohibited purposes of the taking or holding. Others include such purposes by use of the word "otherwise" or similar terms. Under such statutes, it is immaterial that the kidnapping followed the other offense if done for the purpose of perfecting that offense.<sup>112</sup> It is elementary that an accused may be convicted of and sentenced for both kidnapping and the offense which was the object of the kidnapping if both can be proved and if they meet the test of separate offenses for this purpose.

### D. CONSENT

Kidnapping is an offense against the will of the victim and therefore without his consent. Application of this rule depends on determination of two questions: who is the victim?; what constitutes consent?

The answer to the first question appears obvious at first glance. Certainly, in the case of competent adults, the person kidnapped is, himself, the victim. In the case of a child, this may not be true. It has been held that when a child is kidnapped, the offense is against the parents and not against the child.<sup>113</sup>

The significance of this view is apparent when it is considered that the consent of the person against whom the offense was allegedly committed is a defense if the person was competent and the consent was not unlawfully procured.<sup>114</sup> If the offense is held to be against the parent then consent of the child is immaterial, and it is not necessary to consider whether the child was competent to consent.<sup>115</sup>

<sup>112</sup> *People v. Bean*, 88 Cal. App. 2d 34, 198 P. 2d 379 (1948).

<sup>113</sup> *People v. Simmons*, 12 Cal. App. 2d 329, 55 P. 2d 297 (1936); *Tweedy v. State*, 61 Ga. App. 667, 7 S.E. 2d 206 (1940); *State v. Lacoshus*, 96 S.H. 76, 70 A. 2d 203 (1950).

<sup>114</sup> *Thompson v. State*, 215 Ind. 129, 19 N.E. 2d 165 (1939); *People v. Rosenthal*, 289 N.Y. 482, 46 N.E. 2d 895 (1943).

<sup>115</sup> See note 113, *supra*.



## KIDNAPPING

There is an exception in the rare case in which the child has neither parent nor guardian. In such a case, consent of the child is a defense and competence may be in issue.<sup>116</sup>

In those jurisdictions where the offense is considered one against the person kidnapped in all cases, competence may become an issue when consent of a child is raised as a defense. In the case of an adult or a child above a certain age (in federal law, 14 years) competence is usually presumed. If the presumption is rebutted or is inapplicable, competence to consent is a question of fact except in the case of a very young child when there may be a presumption of incompetence.<sup>117</sup>

### E. OFFENSES BY PARENTS

Many state kidnapping statutes contain no express exception for a parent taking his child. However, the courts recognize the right of a parent to control the child, and therefore hold that a parent who has not been divested of custody by decree of a court of competent jurisdiction cannot kidnap his own child.<sup>118</sup> This rule has also been applied to one standing *in loco parentis*.<sup>119</sup> An agent acting for a parent may not fare so well. Such an agent has been held to have committed the offense even though the parent for whom the agent acted would not have been so held.<sup>120</sup> The better and more modern rule appears to be that if the agent acts solely for the parent, and strictly within the limits of the parental authorization, he may claim the benefit of the parent's exemption from criminal liability.<sup>121</sup> As very few courts have decided this question, it is not possible to predict what rule will be adopted in a case of first impression. By the same token, the attorney is free, in most states, to argue the point along whichever line he sees fit. It is submitted, however, that the courts would do well to follow the view set forth last, above,

As indicated, the law is quite well settled among the various states that a parent loses his exempt status when the right to custody of the child has been taken from him by decree of a court of competent jurisdiction. In some states, he may be convicted of kidnap-

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<sup>116</sup> *LeCroy v. State*, 77 Ga. App. 851, 50 S.E. 2d 148 (1948) (dictum); see *Boatwright v. State*, 57 Ga. App. 193, 194 S.M. 837 (1938).

<sup>117</sup> *State v. Hoyle*, 114 Wash. 290, 194 Pac. 976 (1921).

<sup>118</sup> *People v. Spiers*, 17 Cal. App. 2d 477, 62 P. 2d 414 (1936); cf. *State v. Elliot*, 171 La. 306, 131 So. 28 (1931).

<sup>119</sup> See *Wade v. State*, 24 Ala. App. 176, 132 So. 71 (1931) (dictum).

<sup>120</sup> See *State v. Rrandenberg*, 232 Mo. 531, 134 S.W. 529 (1911).

<sup>121</sup> See *State v. Elliot*, 171 La. 306, 131 So. 28 (1931); *People v. Nelson*, 322 Mich. 262, 33 N.W. 2d 786 (1948).

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ping even if he was unaware of the decree.<sup>122</sup> In others, ignorance of the existence of a custody decree has been held to be a defense.’\*

### F. ABDUCTION

Thus far, little has been said of immoral acts as prohibited purposes of kidnapping. Many of the statutes are broad enough to include such acts and a few expressly include one or more immoral acts as purposes of the taking or holding in kidnapping. Certainly the word “otherwise” among the purposes enumerated in a statute includes purposes of immorality. Similarly, a kidnapping for an immoral purpose may be punished under a statute requiring no specific intent or purpose which will characterize the unlawful taking of a human being as kidnapping. There are also statutes which may include such purposes but which permit an inseparable capital sentence, thus prohibiting their use by the military. This gap is filled, partially, by abduction statutes.

Most modern abduction statutes prohibit the taking of a woman against her will for forced marriage or defilement. Sometimes, the taking of a female below a specified age for any purpose is prohibited. “Defilement” includes fornication or prostitution.<sup>124</sup> Some statutes specify prostitution, but this term may include fornication.<sup>125</sup> Other statutes include the words “for an immoral purpose.” Several apply only to girls below a specified age, and at least one also prohibits the taking of males.<sup>126</sup> These statutes may prove useful when prosecution for kidnapping cannot be maintained. They are available in thirty-one states.<sup>127</sup>

<sup>122</sup> See *State v. Taylor*, 125 Kan. 594, 264 P. 1069 (1928) : *Commonwealth v. Bresnahan*, 255 Mass. 144, 150 K.E. 882 (1926).

<sup>123</sup> See *Hicks v. State*, 158 Tenn. 204, 12 S.W. 2d 385 (1928).

<sup>124</sup> *People v. Palacio*, 86 Cal. App. 2d 778, 195 P. 2d 439 (1948).

<sup>125</sup> See *Lopez v. State*, 70 Tex. Cr. 71, 156 S.W. 217 (1913) (reversed on other grounds).

<sup>126</sup> See *e.g.*, § 940.32, WIS. STATS., ANNO.

<sup>127</sup> Secs. 14-1, 14-2 ; ALA. CODE ; § 41-3407, ARK. STATS. 1947 ANNO. ; § 265 CAL. PEN. CODE ; § 309-1, REV. LAWS, HAWAII, 1955 ; § 18-501, IDAHO CODE, 1947 ; ch. 38, § 1, ILL. ANNO. STATS. ; § 21-426, GEN. STATS. KAN., ANNO. ; § 435.110 BALDWIN'S KY. REV. STATS. 1942 (1952 Rev.) ; ch. 130, § 13, REV. STATS. ME., 1954 ; art. 27, § 2, ANNO. CODE MD., 1957 ; ch. 272, § 2, MASS. GEN. LAWS, ANNO. ; § 28-203, MICH. STATS., ANNO. ; § 617.05, MINN. STATS. ANNO. ; § 1994, MISS. CODE 1942, ANNO. (Recomp. 1956) ; § 559.280, VERNON'S ANNO. MO. STATS. ; § 94-4105, RET. CODES MONT. 1947, ANNO. ; § 201.010, NEV. REV. STATS. ; §§ 2A:86-1 to 2A:86-3, N.J. STATS., ANNO. ; § 40-39-4, N.M. STATS., 1953, ANNO. ; § 70, N.Y. PEN. CODE ; § 14-39, GEN. STATS. N.C. (1953 Recomp.) ; § 12-32-05, N.D. CENT. CODE, ANNO. ; ch. 21, § 1119, OKLA. STATS. ; §§ 16-403, 16-404, CODE OF LAWS, S.C., 1952 ; § 13-2705, S.D. CODE, 1939 ; § 39-3709, TENN. CODE, ANNO. ; art. 1180, VERNON'S TEX. PEN. CODE ; § 9.79.050, REV. CODE WASH. ; § 5929 W. VA. CODE 1955, ANNO. ; § 940.32, WIS. STATS., ANNO.

## V. AS AN OFFENSE IN MILITARY LAW

### A. THEORIES OF PROSECUTION

Kidnapping is not proscribed in express terms by any article of the Uniform Code of Military Justice. Therefore, if it is an offense in military law, it must be by virtue of Article 133, which prohibits conduct unbecoming an officer and a gentleman, or Article 134, the "general article," or both. As the offense will be found violative of Article 134, consideration of Article 133 is unnecessary.

Article 134 proscribes conduct of three types: (1) disorders and neglects to the prejudice of good order and discipline in the armed forces; (2) conduct of a nature to bring discredit on the armed forces; and (3) crimes and offenses not capital. The first two prohibitions are often used interchangeably, but a moment's reflection must show that such use is incorrect. Though many acts of misconduct are both service discrediting and prejudicial to good order and discipline, all are not.

Conceivably, a kidnapping might prejudice good order and discipline without tending to discredit the armed forces in any way. Although the circumstances of a particular case might dictate procedure under that theory, such a case would be so rare as not to warrant discussion here.

Certainly, kidnapping is service discrediting conduct if it is "public" as required under Article 134.<sup>128</sup> The "public nature" of an act may be determined by its locale, as being open to the public or a portion thereof, or by its being committed in the presence of others.<sup>129</sup> This theory is useful in foreign countries and for offenses committed in the United States, within a single state but outside any federal enclave, as will be seen later.

### B. LACK OF JURISDICTION OF CAPITAL OFFENSES

Obviously, a capital crime may not be tried under the third proscription of Article 134, that of crimes and offenses not capital. That portion of the Article refers to acts or omissions not proscribed by another article, but which are proscribed by act of, or under the authority of, Congress and made triable in the federal courts.<sup>130</sup> Furthermore, this limitation is jurisdictional, so that a capital offense may not be tried under either of the other provisions of Article 134, nor under Article 133.<sup>131</sup>

<sup>128</sup> Cf. *United States v. Snyder*, 1 USCMA 423, 4 CMR 15 (1952).

<sup>129</sup> See *United States v. Berry*, 6 USCMA 609, 20 CMR 325 (1956).

<sup>130</sup> U.S. DEP'T OF DEFENSE, MANUAL, FOB COURTS-MARTIAL, 1951, para. 213c.

<sup>131</sup> *United States v. French*, 10 USCMA 171, 27 CMR 245 (1959).

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Whether an offense charged under these articles is capital is determined by the allegations contained in the specification (the military equivalent of an indictment or information). Therefore, if the specification alleges the necessary elements of an offense which, by act of or under authority of Congress, may be punished by death, the court-martial is without jurisdiction regardless of the theory of prosecution and despite the fact that the court-martial is prohibited from imposing the death penalty.<sup>132</sup>

### C. THE FEDERAL ACT—SEPARABILITY AS TO PUNISHMENTS

Because of the limitation of court-martial jurisdiction, in connection with Article 134, Uniform Code of Military Justice, to offenses for which a capital sentence is not authorized, kidnapping in violation of the Federal Act may be prosecuted only if it is possible to define a non-capital offense in the specification.

Throughout the history of the Federal Kidnapping Act, the question of whether an offense charged under the act must necessarily be considered capital has arisen several times.

In 1937, a district court held that the defendant before the court was not entitled to a change of venue. Although the indictment alleged that bodily harm was inflicted on the victim while he was held it did not allege that he was not released unharmed. Therefore, said the court, the offense alleged was not capital.<sup>133</sup> The Third Circuit Court of Appeals, affirming, stated that “. . . the indictment, while charging beating and torture . . . did not aver any continuing or permanent injury to [victim] . . . nor was it alleged either that he was still in the custody of the kidnappers or that he had been liberated by them in a harmed condition.”<sup>134</sup> The court added that, as the evidence showed the victim was released unharmed, it was unnecessary to decide whether an allegation of harm must be included in the indictment in order to make the case capital.

In 1942, the Ninth Circuit Court of Appeals had before it a petition for *habeas corpus* in which the petitioner urged that he had been indicted for kidnapping, in violation of the Federal Kidnapping Act, but had not been furnished copies of the indictment and the witness and jury lists as required in capital cases.<sup>135</sup> In denying the writ, the court said the defendants had not been accused of a capital

<sup>132</sup> *Ibid.*

<sup>133</sup> *United States v. Parker*, 19 F. Supp. 430 (D.S.J., 1937).

<sup>134</sup> *Parker v. United States*, 103 F. 2d 857, 861 (3d Cir., 1939), *cert. denied*, 307 U.S. 642 (1939).

<sup>135</sup> 18 C.S.C. § 3432 (1958).

offense“. . . for, admittedly, the kidnapped person . . . was liberated unharmed before they were indicted.”<sup>136</sup>

In 1944, a defendant convicted of kidnapping appealed from the death sentence on the ground that the allegation, in the indictment, that the victim was not released unharmed was vague and uncertain. The appeal was denied on the ground that this allegation did not state an essential element of the offense charged.<sup>137</sup>

In still another case, the defendant was indicted for kidnapping in 1934. He fled and remained in hiding and in 1937 a *nolle prosequi* was entered. In 1940, the defendant returned to his home and lived there openly until 1948, when he was apprehended and again indicted. At trial he moved to dismiss on the ground that prosecution of the offense was barred by the statute of limitations. The trial court denied the motion on the ground that the statute did not run against a capital offense. On appeal, the court said, “we agree that the indictment stated all the essential elements of the crimes charged, and that it was not necessary to allege that the victim was not released ‘unharmed’ in order that the jury might recommend the death penalty.”<sup>138</sup>

Finally, in 1956, a defendant was tried for kidnapping on information. He appealed, contending that, as the offense was capital, it was improper to proceed by information. The information was silent as to whether the victim was liberated harmed or unharmed but the evidence showed the latter.

The Supreme Court held that the case was capital and must be tried on indictment.<sup>139</sup> Some of the Court’s language is most interesting :

The charging part of the information . . . [did not state] whether Spearman was released harmed or unharmed. . . .

The courts of Appeals which have been concerned with the statute have uniformly construed it to create the single offense of transporting a kidnapping victim across state lines. We agree with this construction. . . . When an accused is charged, as here, with transporting a kidnapping victim across state lines, he is charged and will be tried for an offense which may be punished by death. Although the imposition of that penalty will depend on whether sufficient proof of harm is introduced during the trial, that circumstance does not alter the fact that the offense itself is one which may be punished by death and thus must be prosecuted by indictment. In other words, when the offense as charged is sufficiently broad to justify a capital verdict, the trial must proceed on that basis, even though the evidence later establishes that such a verdict cannot be sustained because the victim was released unharmed. It is neither pro-

<sup>W</sup> Brown v. Johnson, 126 F. 2d 727, 728 (9th Cir., 1942).

<sup>137</sup> Robinson v. United States, 144 F. 2d 392 (6th Cir., 1944).

<sup>138</sup> United States v. Parrino, 180 F. 2d 613, 615 (2d Cir., 1950).

<sup>139</sup> Smith v. United States, 360 U.S. 1 (1959).

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cedurally correct nor practical to await the conclusion of the evidence to determine whether the accused is being prosecuted for a capital offense.<sup>140</sup>

Justices Harlan and Stewart joined in a dissent written by Mr. Justice Clark.<sup>141</sup> The dissenters would hold that the statute creates two offenses, one capital and the other non-capital. They would require that the capital offense be prosecuted by indictment alleging that the victim was not released unharmed. The non-capital offense could be prosecuted by information, the government having precluded itself from seeking the death penalty. The dissent also points out that the majority holding allows the grand jury to indict a capital offense without knowing it is capital and that, although the majority says, "It is neither procedurally correct nor practical to await the conclusion of the evidence to determine whether . . ." the case is capital, the holding requires just that.

Now the unimaginative will say the court has closed the door and it is not possible to dram a kidnapping charge, under the Federal Kidnapping Act, which will allege a non-capital offense. They may be right, but the writer believes they are wrong. Three of the justices believe a charge can be so drawn. The remainder, although at first making broad statements, were careful, in the end, to limit their holding to the facts of this case. One of those facts was that the indictment was completely silent on the point of release harmed or unharmed. The court's language strongly implies an invitation to try another tactic. It is submitted that if a case were tried on information, and if that information contained a clear allegation that the victim was released unharmed, the court would hold that the offense was not capital and approve the prosecution on information.

Therefore, it follows that omission of such an allegation will surely result in dismissal of a case tried under Article 134 as a crime or offense not capital. However, such an allegation, while it does not state an element of the offense but Serves only to establish jurisdiction over the offense, would define a non-capital offense. In military law, this particular jurisdictional issue is determined from "the four corners of the specification."<sup>142</sup> Therefore, the mere inclusion of the allegation in the specification will serve the desired purpose.

### D. THE FEDERAL ACT—ELEMENTS AND PUNISHMENTS

The other necessary allegations and the elements of proof under the Federal Act are: (1) an unlawful taking or enticing away of the victim; (2) a holding of the victim for a specific purpose; (3) trans-

<sup>140</sup> *Id.*, at 7.

<sup>141</sup> *Id.*, at 11.

<sup>142</sup> See *United States v. French*, 10 USCMA 171, 178, 27 CMR 245, 252 (1959).

portation of the victim across a state or international boundary; and (4) knowledge on the part of the accused. However, as the offense is not the kidnapping, itself, but the interstate or foreign commerce aspect, it should not be necessary to show that the kidnapping was done by the accused or even with his knowledge so long as he has knowledge of it at the time of the transportation for which he is prosecuted.

Determination of the maximum sentence which may be imposed by a court-martial under the Federal Kidnapping Act is quite simple but, nevertheless, merits mention. Subparagraph 127c, *Manual for Courts-Martial, United States, 1951*, provides that if neither the offense in question (expressly or by inclusion in another offense) nor any closely related offense appears in the table of maximum punishments, a part of that subparagraph, the punishment provided by the United States Code or the Code of the District of Columbia, whichever is lesser, shall control. Neither kidnapping nor any closely related offense appears in the table of maximum punishments. Both the United States Code and that of the District of Columbia punish the offense (in the aspect triable in a court-martial) by life imprisonment. The maximum punishment imposable by a court-martial is therefore dishonorable discharge, total forfeiture, and confinement at hard labor for life.<sup>143</sup>

## E. STATE STATUTES

### 1. *Effect of the Assimilative Crimes Act.*

The Assimilative Crimes Act, Title 18, United States Code, section 13, provides that :

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by an enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

The reference to "section 7 of this title" refers to:

Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building.<sup>144</sup>

The effect of the Assimilative Crimes Act is not simply to permit prosecution under state law. Rather, it adopts the criminal law,

<sup>143</sup> See *United States v. White*, 12 USCMA 599, 31 CMR 185 (1962).

<sup>144</sup> 18 U.S.C. § 7 (3) (1958).

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including common law, of the state as federal law.<sup>145</sup> The state law is adopted as interpreted by the state courts<sup>146</sup> and the adoption is progressive; that is, the law in effect in the state when an act is committed is the law adopted.<sup>147</sup>

The Assimilative Crimes Act does not adopt state law as to offenses already made punishable by Congress<sup>148</sup> nor that which is contrary to an officially announced federal policy.<sup>149</sup> However, closely related crimes involving different acts are not excluded.<sup>150</sup> Thus, as the Federal Kidnapping Act is directed to the interstate commerce feature of kidnapping, it does not preclude adoption of state statutes applicable to intra-state kidnapping.

The state statute of limitations is not adopted.<sup>151</sup> Although the period of limitation in federal law is five years,<sup>152</sup> it appears trial before a court-martial would be limited by Article 43 of the Uniform Code of Military Justice which, by its terms, is applicable to any offense tried before a court-martial.<sup>153</sup>

### 2. *Separability.*

As with the Federal Act, assimilated state law can be the basis of an Article 134 prosecution only if it is possible to plead a non-capital case.

The only feasible approach to the problem within the limits of this article appears to be consideration of several statutes which will serve to show the forms, and some of the terms, usually encountered, followed by consideration of the meanings given by the courts of various jurisdictions to similar forms and terms. It must be borne in mind that the statutes considered are examples only. They are not and are not intended to be representative.

Nothing is to be gained by consideration of the form of any statute which does not provide a capital sanction. We may assume, for the moment, that any offense arising under such a statute could be tried in a military court with the issues limited to substantive and evidentiary requirements. However, the terminology of such statutes is important. The general discussion of terms should be understood as referring as much to these noncapital statutes as to others.

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<sup>145</sup> See *United States v. Wright*, 28 Fed. Cas. 791 (D. Mass., 1871) (not necessary to plead the state law); *Puerto Rico v. Shell Co.*, 302 U.S. 233, 266 (1937) (dictum).

<sup>146</sup> See *United States v. Andem*, 158 Fed. 996 (D.N.J., 1908).

<sup>147</sup> *United States v. Sharpnack*, 355 U.S. 286 (1958).

<sup>148</sup> *Williams v. United States*, 327 U.S. 711 (1946).

<sup>149</sup> See *Sash v. Air Terminal Servs., Inc.*, 85 F. Supp. 545 (E.D. Va., 1949).

<sup>150</sup> *Dunaway v. United States*, 170 F. 2d 11 (10th Cir., 1948).

<sup>151</sup> *United States v. Andem*, 158 Fed. 996 (D.S.J., 1908).

<sup>152</sup> 18 U.S.C. § 3282 (1958).

<sup>153</sup> 10 U.S.C. § 843 (1958).



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Form becomes important in those statutes which provide a capital sanction. For our purposes, they may be considered to be of two general types; those in which the capital provisions are not separable, so that any offense laid under the statute is a capital offense, and those in which the provisions are, or may be, separable, so that a noncapital offense can be pleaded despite the fact that the statute also proscribes an offense which is capital.

Only two states<sup>154</sup> have no non-capital or separable statute dealing with kidnapping (as distinguished from abduction). Eleven states<sup>155</sup> have statutes following the form of the Federal Act to a sufficient degree that, under the rationale presented in connection with federal law,<sup>156</sup> it is probable a non-capital offense can be pleaded, although the statute contains only a capital sanction. Several of those statutes are concerned only with kidnapping for ransom, other types being dealt with in separate sections. The reader is cautioned that few courts have decided this issue. Unless otherwise indicated, remarks as to separability reflect only the opinion of the writer.<sup>157</sup>

Typical of the inseparable statutes, under which a non-capital offense apparently cannot be alleged, is that of Virginia :

. . . abduction with the intent to extort money, or pecuniary benefit, abduction against her will of any female with intent to defile her, and abduction of any female under sixteen years of age for the purpose of concubinage or prostitution shall be punished with death, or by confinement in the penitentiary for life or any term not less than three years.<sup>158</sup>

Such a statute is of interest to the military lawyer only for the purpose of recognition. It should be noted in passing that Virginia has another statute,<sup>159</sup> relating to kidnapping for other purposes, which provides a noli-capital sanction.

The Colorado statutes, one defining the offense and the second prescribing punishments, are an excellent example of the separable type :

A person shall be guilty of kidnapping who willfully :

. . . .

(4) Seizes, takes, carries or sends, forcibly, or otherwise, or causes to be seized, taken, carried or sent, forcibly or otherwise, out of this state, any person against his will . . . for the purpose of extorting ransom or money

<sup>154</sup> N.Y. PEN. CODE, § 1250; WYO. STAT., §§ 6-59, 6-61.

<sup>155</sup> ARIZ., § 13-492, REV. STATS., ANNO., 1936; COLO., § 40-2-45, REV. STATS., 1953; CONN., § 52-27 GEN. STATS., ANNO.; LA., § 14:44, REV. STATS.; NEB., § 28-417, REV. STATS., 1943 (Reissue, 1956); NEV., §§ 200.310, 200.320, 200.330, REV. STATS.; N.J., § 2A:118-1, STATS., ANNO.; N.M., § 40-25-3, STATS., 1953, ANNO.; OHIO, § 2901.27, PAGE'S REV. CODE, ANNO.; S.C. § 16-91, CODE OF LAWS, 1952; S.D., § 13-2701, CODE, 1939 (1960 Supp.).

<sup>156</sup> Pp. 24-26, *supra*.

<sup>157</sup> But see *State v. Paris*, 8 N.J. Super. 383, 72 A. 2d 558, 560 (1949) (dictum).

<sup>158</sup> Sec. 18.1-38, CODE OF VA., 1950 (1960 Rev.).

<sup>159</sup> Sec. 18.1-37, CODE OF VA., *supra* note 158.

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or other valuable thing or concession . . . or who secretly seizes, confines or imprisons any person within this state for the purpose of extorting money or ransom or other valuable thing or concession. . . .<sup>160</sup>

Every person found guilty . . . shall be deemed guilty of a felony and punishable as follows: (1) Where individuals are, or an individual is, subjected to such kidnapping as defined in subsection (4), [of the preceding section] and suffers bodily harm inflicted by such kidnapper or abductor, the jury shall . . . fix the penalty at death or imprisonment for life.

(2) Where . . . an individual is, subjected to such kidnapping or abduction under subsection (4), and suffers no bodily harm . . . the offender . . . shall be sentenced to . . . not less than thirty years nor more than life imprisonment. . . .<sup>161</sup>

The Arizona statute is similar but fixes the punishments in different subsections of the section defining the offense.<sup>162</sup> Finally, the New Jersey statute is of interest as a separable type which represents an approach toward the inseparable:

Any person who kidnaps or steals or forcibly takes away a man, woman or child . . . or who procures such act to be done, . . . shall be punished by imprisonment for life, or for such other term. . . .

Any person who kidnaps . . . a man, woman or child . . . and demands for the return of such man, woman or child, money or other thing of value . . . shall suffer death. . . .<sup>163</sup>

Dictum of a New Jersey court indicates the section quoted proscribes two offenses, one capital and the other non-capital, which may be pleaded in that fashion,<sup>164</sup> and the holding of the United States Court of Military Appeals in *United States v. Harkcom*<sup>165</sup> necessarily implies that court's opinion that a non-capital offense may be pleaded under the New Jersey statute, though the issue was not raised in the case.

Separability is undoubtedly determined by the form of the statute. When the courts have not determined the issue, it would appear that the statutory forms set forth above may be taken as general guides following the reasoning used in connection with the Federal Act.<sup>166</sup>

### 3. Pleading and Proof.

As the Assimilative Crimes Act does not adopt state law as to sufficiency of indictments,<sup>167</sup> the sufficiency of a specification and requirements of proof under a state kidnapping statute assimilated

<sup>160</sup> Sec. 40-2-44, COLO. REV. STATS., 1933.

<sup>161</sup> Sec. 40-245, COLO. REV. STATS., 1933.

<sup>162</sup> Sec. 13-492, ARIZ., REV. STATS., ANNO.

<sup>163</sup> Sec. 2A : 118-1, S. J. STATS., ANNO.

<sup>164</sup> *State v. Paris*, 8 N.J. Super. 383, 72 A. 2d 558, 560 (1949) (dictum).

<sup>165</sup> 12 USCMA 257, 30 CMR 257 (1961).

<sup>166</sup> See pp. 24-26, *supra*.

<sup>167</sup> *McCoy v. Pescor*, 145 F. 2d 260 (8th Cir., 1944), *cert. denied*, 324 U.S. 868 (1945).

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are determined by the elements of the statutory offense as defined in the statute and by the state courts.

Obviously, the requirements of allegation and proof will vary from state to state, and resort must be had to state law before drafting a specification. However, the requirements may be generally summarized as follows :

(1) **An** unlawful taking [and carrying away, where required] [with a certain intent or for **a** certain purpose, where required] ;

(2) [an unlawful holding, where required] [with a certain intent or for a certain purpose, where required] ; and

(3) **In** the specification only, an averment precluding imposition **of** the death sentence if such is necessary to establish the jurisdiction **of the** court.

### 4. *Punishment.*

The Assimilative ~~Crimes~~ Act adopts the punishments provided by the assimilated state statute. As previously noted, the effect of the Assimilative Crimes Act is to convert state law into federal law. Paragraph 127c, *Manual for Courts-Martial, United States, 1951*, provides that when the maximum punishment imposable by a court-martial for a particular offense is not listed therein, either specifically or by relation to another offense, the punishment provided by the United States Code or the Code of the District of Columbia, whichever is lesser, shall control. Kidnapping falls in this category. The Code of the District of Columbia provides a maximum penalty of life imprisonment for kidnapping, regardless of aggravating circumstances. While this penalty, being lesser than that provided by the United States Code, may be limiting on a court-martial, the question is academic at this point. **As** we have seen, if the assimilated state statute authorizes the death penalty, a court-martial is without jurisdiction even though the sentencing power of the Court-martial might be limited to life imprisonment.

On the other hand, if the state statute (which has become federal law by operation of the United States Code) does not authorize the death penalty, the punishment authorized by it is either equal to or lesser than that authorized by the Code of the District of Columbia, and is therefore binding upon the court-martial. We see, then, that we must always **look** to the assimilated state statute to determine, not only the jurisdiction of the court-martial, but also the maximum sentence which it may impose. However, such a statute limits only the kinds of punishment therein prescribed and the court-martial is free to add other kinds of punishment which are within its jurisdiction and not prohibited by the Uniform Code of Military Justice.<sup>168</sup> Additional punishments may therefore include such traditional pun-

<sup>168</sup> United States v. White, 12 USCMA 599, 31 CMR 185 (1982).

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ishments as punitive discharge, forfeiture of all pay and allowances, and reduction.

There is a possible exception to the method discussed above for determination of maximum punishment. If an intrastate kidnapping occurs entirely outside the limits of any federal enclave, or within an enclave to which the Assimilative Crimes Act is not applicable, there is no federal law upon which Article 134, Uniform Code of Military Justice, can operate. This would preclude trial of the offense as a "crime or offense not capital." Nevertheless, the acts of the offender may, in appropriate circumstances, be tried as conduct of a nature to bring discredit on the military services. In such a case, where do we seek the limits of punishment?

In such a case, we have seen that paragraph 127*c*, *Manual for Courts-Martial, United States*, 1951, requires that we look to the United States Code and that of the District of Columbia. In this connection, the discussion of the punishment problem in overseas areas, which follows, is applicable. We must not forget, however, that even though the Assimilative Crimes Act was inapplicable where the offense was committed, it will, in all probability, be applicable where the trial is held. Thus, the assimilated law of the surrounding state will constitute another federal statute which we must examine in determining what is the lesser of the punishments provided by the United States Code and that of the District of Columbia.

### F. IN OVERSEAS AREAS

The Assimilative Crimes Act, by its own terms, is operative only within a political subdivision of the United States and the Federal Kidnapping Act is a statute of the type having no extraterritorial application.<sup>169</sup> Therefore, if kidnapping is an offense overseas (i.e., in a foreign country), it must be so by operation of the Uniform Code of Military Justice. As no article of the Uniform Code specifically prohibits kidnapping, it is not an offense unless it may be subsumed under Article 134, the "general article."

The "crimes and offenses not capital" provision of Article 134 does not adopt foreign law.<sup>170</sup> As there is no federal law concerning kidnapping which extends overseas, the latter portion of Article 134 is ineffective in those areas as to the offense of kidnapping. However, as we have already decided, in the first section of this chapter, that

<sup>169</sup> See *United States v. Bowman*, 260 U.S. 94, 98 (1922) (dictum); U.S. DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL*, 1951, para. 213*c* (1) and (2).

<sup>170</sup> ACM 5636; Hughes, 7 CMR 803 (1953); ACM 5-5504 Wolverton, 10 CMR 641 (1953); UNITED STATES DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL*, 1951, para. 213*c*.

kidnapping is an offense prejudicial to good order and discipline or, most often, of a nature to bring discredit on the armed forces, we may consider that it is an offense violative of Article 134, regardless of the availability of other federal law. There remains for consideration the issue of jurisdiction and the question of punishment.

Paragraph 127c, *Manual for Courts-Martial, United States, 1951*, prescribes maximum punishments imposable by courts-martial for most offenses. Many offenses are specifically mentioned together with the maximum punishment authorized for each. Others are covered by a provision that "Offenses not listed in the table [of maximum punishments], and not included within an offense listed, or not closely related to either, remain punishable as authorized by the United States Code . . . or the Code of the District of Columbia, whichever prescribed punishment is the lesser, or as authorized by the custom of the service."

Kidnapping is not listed in the table of maximum punishments. The United States Court of Military Appeals has held this offense is neither included in nor closely related to any offense listed or included in a listed offense.<sup>171</sup>

The next question is the meaning of the words ". . . remain punishable as authorized by the United States Code . . . or the Code of the District of Columbia . . . ." Does this mean the punishment provided by one of those codes may be used as the maximum punishment in a court-martial only when the offense before the court corresponds in all respects to the offense proscribed by that code? This question is not settled in military law, though when a court or board of review has looked to one of the codes for punishment authorization, it has generally looked there also for the elements of the offense.

The question is important because the United States Code is concerned only with the interstate or foreign commerce aspect of kidnapping, while the Code of the District of Columbia prohibits only kidnapping "for ransom or reward." Therefore, if the provision, quoted above, of the *Manual for Courts-Martial* is to be thus narrowly construed, the maximum punishment for many kidnappings which may be committed overseas is nowhere specifically set forth,

An Army board of review, facing this enigma when dealing with a similar provision of a former manual for courts-martial, held that, as neither of the codes in question defined the precise offense with which the board was concerned and the table of maximum punishments did not list it or any related offense, the only limitation on punishment was the statute (Article of War) violated by the act of

<sup>171</sup> *United States v. Picotte*, 12 USCMA 196, 30 CMR 196 (1961).

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which accused had been convicted.<sup>172</sup> By this reasoning, as Article 134 of the Uniform Code of Military Justice provides that violations "... shall be taken cognizance of by a ... court-martial ... and punished at the discretion of such court" the maximum punishment for kidnapping in a foreign country is life imprisonment.<sup>173</sup>

While the author agrees with that result, a different line of reasoning is preferred. In view of the number of offenses specifically set out in the table of maximum punishments, it may be reasonably assumed that the provision for reference to the United States Code or that of the District of Columbia was intended as a "catch-all" to provide a maximum punishment for every offense which might conceivably be tried by a court-martial. In other words, the intent was to provide, not only for offenses specifically proscribed by those codes, but also for offenses closely related to those proscribed. To reason otherwise would result in subjecting the perpetrators of many minor offenses to severe penalties simply because their offenses cannot be brought within the limitations of the table of maximum punishments and are not *specifically* defined by either the United States Code or that of the District of Columbia. It is unreasonable to assume the drafters of the *Manual for Courts-Martial* intended such a result.

Though the latter line of reasoning is preferred, either produces the same result when applied to the offense of kidnapping. Life imprisonment is the lesser of the punishments provided by the codes referred to and is also the punishment permitted by the Uniform Code of Military Justice if it is determined that neither the United States Code nor that of the District of Columbia is applicable. In either case, other forms of punishment, such as punitive discharge, forfeiture of pay and allowances, and reduction, may be added."<sup>4</sup>

A moment's reflection will show that by the foregoing discussion, we have also resolved the jurisdiction issue. If the United States Code and local law are inapplicable and punishment under any possible theory of prosecution as a violation of the Uniform Code of Military Justice is limited to life imprisonment, it follows that no offense of kidnapping is capital in overseas areas. This being true, without regard to whether the victim is liberated unharmed, it is not necessary to plead the victim's condition on liberation to confer jurisdiction on the court. On the other hand, an allegation that the

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<sup>172</sup> CM 255335, Sheridan, 50 BR 89, 95 (1944). This was a case of kidnapping with intent to rob. As the offense occurred in California, the conclusion was erroneous, the board having overlooked the Assimilative Crimes Act. However, the reasoning could be applied in a proper case arising overseas.

<sup>173</sup> Article 18, UNIFORM CODE OF MILITARY JUSTICE (10 U.S.C. 818) prohibits imposition of the death penalty unless specifically authorized.

<sup>174</sup> United States v. White, 12 USCMA 599, 31 CJIR 185 (1962).

## KIDNAPPING

victim was harmed, being unnecessary, might well be considered so prejudicial as to require reversal.

### VI. SUMMARY

Kidnapping, an offense neglected by the military in recent years, has been rediscovered. Almost every state has at least one statute which is assimilated as federal law by the Assimilative Crimes Act and is available to the military prosecutor. In addition, the Federal Kidnapping Act is available for use in interstate crimes when the victim has been liberated unharmed,

Within the United States, kidnapping is a statutory crime and pleadings must be drafted and proof adduced in accordance with the terms of the pertinent statute as interpreted by the courts.

In foreign countries, the offense may be prosecuted before courts-martial as an offense of a nature to bring discredit on the military service or, in rare cases, as an offense prejudicial to good order and discipline in the armed forces. The offense of abduction may be prosecuted under the same theories.

Punishment is governed by the statute under which the prosecution is brought or, in foreign countries, by the Code of the District of Columbia. When the statute permits imposition of the death penalty, the offense may not be prosecuted before a court-martial unless it is possible to allege a non-capital variety of the offense within the terms of the statute.

Such details of proof as lack of consent, intent, requirement of asportation, purpose, and punishment may be discussed generally but their final determination in any case depends upon the terms of the statute in use as interpreted by the courts.

APPENDIX  
SUGGESTED FORMS OF SPECIFICATIOSS

I

Cases Under The Federal Kidnapping Act

In that \_\_\_\_\_ did, on or about \_\_\_\_\_, knowingly and unlawfully transport in interstate [foreign] commerce, to wit ; from the vicinity of \_\_\_\_\_, in [the State of] \_\_\_\_\_ to the vicinity of \_\_\_\_\_, in [the State of] \_\_\_\_\_, one \_\_\_\_\_, he, the said \_\_\_\_\_, then well knowing that the said \_\_\_\_\_ had been kidnapped and was then and there held without his consent and against his will for the purpose of [extracting a ransom (reward) for his release] [\_\_\_\_\_], the said \_\_\_\_\_ being thereafter liberated unharmed.

II

Under A State Statute Assimilated By Title 18, United States Code, Section 13

*Caveat:* The following forms should be taken as guides only. Reference to state law and corresponding modification will be necessary in almost every instance.

Kidnapping

In that \_\_\_\_\_ did, at \_\_\_\_\_, on or about \_\_\_\_\_, [with intent to \_\_\_\_\_], unlawfully kidnap [and take away] \_\_\_\_\_ [a (female) child under the age of \_\_\_\_\_ years] [and did thereafter (secretly and) unlawfully hold the said \_\_\_\_\_] [against his will and without his consent (for the purpose of \_\_\_\_\_)] [until the said \_\_\_\_\_ was liberated unharmed].

Abduction

In that \_\_\_\_\_ did, at \_\_\_\_\_, on or about \_\_\_\_\_, wrongfully and unlawfully [seize and take] [entice] [by false representations take] away \_\_\_\_\_ [a female] [a (female) child under the age of \_\_\_\_\_ years] for [an immoral purpose, to wit : \_\_\_\_\_] [the purpose of (forcing her to marry \_\_\_\_\_) (\_\_\_\_\_)].

III

When Federal Law Is Inapplicable

In that \_\_\_\_\_ did, at \_\_\_\_\_, on or about \_\_\_\_\_, wrongfully kidnap and take away \_\_\_\_\_, against his will and without his consent for the purpose of \_\_\_\_\_, such conduct being [of a nature to bring discredit on the Armed Forces of the United States] [prejudicial to good order and discipline in the Armed Forces]



# RELATIONSHIP BETWEEN APPOINTED AND INDIVIDUAL DEFENSE COUNSEL \*

By LIEUTENANT COMMANDER JAMES D. WILDER\*\*

## I. THE ACCUSED AND HIS COUNSEL

### A. ACCUSED'S RIGHT TO COUNSEL

A serviceman accused of a crime, whose case has been referred to a court-martial for trial, has for the past 75 years or so been guaranteed the right to counsel. For the past 10 years, this right has been codified in Articles 27 and 38 of the Uniform Code of Military Justice.<sup>1</sup> Article 27 requires the appointment of military defense counsel in all special and general courts-martial, and further requires that defense counsel in a general court-martial must be a lawyer certified as competent by the Judge Advocate General. Article 38 provides for accused's right to retain civilian counsel at his own expense, or to be represented by military counsel of his own choice<sup>2</sup> if reasonably available. The accused is also permitted to use the services of appointed defense counsel as an associate counsel when he has already obtained individual civilian or military counsel.<sup>3</sup> If accused happens to distrust all lawyers, he has the right to conduct his own defense.<sup>4</sup>

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\*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Tenth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the Views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Re-enacted in 1956 as 10 U.S.C. §§ 801-940 (1958) (hereinafter referred to as the Code and cited as UCMJ, art. — ).

<sup>2</sup> United States v. Kraskouskas, 9 USCMA 607, 26 CMR 387 (1958), limited accused's choice by prohibiting appearance of non-lawyers as counsel in general courts-martial.

<sup>3</sup> See United State's v. Tellier, 13 USCMA 323, 32 CMR 323 (1962) in which this privilege has been converted into a right : "From the beginning, it [Article 38] has been understood to confer upon the accused, as a matter of right, the privilege of having appointed military counsel represent him in addition to any individually selected attorney, military or civilian. . . . Indeed, the language of the Article . . . admits of no other construction." 13 USCMA at 327, 32 CMR at 327 (emphasis added).

<sup>4</sup> United States v. Howell, 11 USCMA 712, 29 CMR 528 (1960).

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If the accused does decide to conduct his own defense, does he have the right to retain the appointed defense counsel as an associate? Article 38(b) of the Code is worded to give accused the right to services of appointed counsel as an associate *if* accused has counsel of his own selection. There are **no** decisions construing the effect of this language in a case where accused desired to conduct his own defense and to retain appointed counsel as an associate. The federal courts have rules that an accused is entitled to conduct his own defense *or* to be represented by counsel, but not to a hybrid of both rights?

A similar rule should be applied in courts-martial to avoid placing the appointed defense counsel in the difficult position of being held to a high degree of professional responsibility<sup>6</sup> while under the control of an accused who has elected to take complete charge of his case.

### B. ADVISING THE ACCUSED

The first, meeting between appointed defense counsel and the accused usually occurs shortly after charges have been referred to trial, at which time counsel is required to advise accused of his right to counsel.<sup>7</sup> In addition to advising accused of this right, counsel is under an obligation to advise accused of his right to conduct his own defense. Although the *Manual* does not require such advice, the accused does have the right to conduct his own defense and it is only logical that the advice required by the *Manual* should extend to that right, at least in the event that accused expresses an intention to conduct his defense.\*

While an accused occasionally manages to retain civilian counsel before his case has been referred to trial, most accused first learn of this possibility during this interview. Most accused cease to consider retention of civilian counsel immediately after they learn that it will

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<sup>6</sup>United States v. Mitchell, 137 F. 2d 1006 (2d Cir. 1943); United States v. Foster, 9 F.R.D. 367 (S.D.N.Y. 1949); Shelton v. United States, 205 F. 2d 806 (5th Cir. 1953); and Duke v. United States, 256 F. 2d 721 (9th Cir. 1958). In Overholser v. DeMarcos, 149 F. 2d 23 (D.C. Cir. 1945), cert. den., 325 U.S. 889 (1945), appearing both pro se and by counsel was considered undesirable, but the court thought that in some cases the interests of justice might make such procedure appropriate. See also Braiser v. Jeary, 256 F. 2d 475 (8th Cir. 1958), cert. den., 358 U.S. 867 (1958), reh. den., 368 U.S. 923 (1958), for a similar rule in civil actions.

<sup>7</sup>United States v. Horne, 9 USCMA 601, 26 CNR 381 (1958).

<sup>8</sup>U.S. DEP'T. OF DEFENSE, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 (hereafter referred to as MCM, 1951, or the Manual), para. 46d.

<sup>9</sup>United States v. Howell, 11 USCMA 712, 29 CMR 528 (1960), requires the law officer to advise accused so as to insure his understanding when accused elects to dismiss his counsel at the trial. It seems logical that appointed counsel should give the accused similar advice when accused indicates a desire to dismiss his counsel prior to the trial.

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involve expenditure of personal funds, for the military accused is usually even more impecunious than his civilian counterpart. However, should an accused desire civilian counsel, and be in a position to afford one, appointed counsel faces certain obligations and problems.

That counsel must properly advise accused of his right to retain counsel is unquestioned. However, should accused then pose the question "Will I be better off hiring a civilian lawyer than I will with you," appointed counsel faces a dilemma. Presumably, he is reasonably competent to represent accused before courts-martial or lie would not have been certified by the Judge Advocate General and appointed to the job by the convening authority. It is only natural for appointed counsel to be self-confident, and to be hesitant to deprecate his abilities. It may be that appointed counsel has observed some of the less competent civilian counsel in action so that he honestly believes that accused will be better off not retaining civilian counsel. On the other hand, lie must be very careful not to prevent accused from making his own choice. Most appointed counsel meet the problem by telling the accused that lie has a right to retain civilian counsel, by discussing what a counsel is and does in very general terms, and by telling the accused that the choice is up to him. It might be practical to suggest to accused that if lie is undecided, he should at least discuss the case with a civilian attorney before making any decision.

### C. ASSISTING ACCUSED TO OBTAIN CIVILIAN COUNSEL

Should the accused respond to this advice with the question "I don't know of any civilian lawyers, can you recommend one?", he has tossed another hot potato into appointed counsel's lap. The *Manual* requires appointed defense counsel to take "appropriate steps" to secure requested individual counsel.<sup>9</sup> However, regulations prohibit (or at least! strongly discourage) military lawyers making direct referrals to specific civilian counsel,<sup>10</sup> and military lawyers generally refrain from so doing. The regulations are apparently designed to avoid: (1) the danger, or any inference, of fee-splitting, referral fees, or kick-backs (which are, of course, completely improper so far as military lawyers are concerned); (2) complaints from the local bar that military legal business is not being fairly distributed; and (3) subsequent complaints from unhappy prisoners that appointed counsel referred them to incompetent lawyers. However, the slowness and inefficiency of bar-sponsored referral services in some areas, or the knowledge

<sup>9</sup> MCM, 1931, para. 46d.

<sup>10</sup> Army Regs. No. 600-103 (Aug. 22, 1961) and SECNAV Instruction No. 5801.1A (Jan. 9, 1962), deal with legal assistance referrals and do not specifically refer to the above situation, but they do demonstrate a policy applicable to all referrals.

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that the community contains only one or two competent criminal lawyers, may cause appointed counsel to feel justified in furnishing the accused with the name or names of the counsel he considers competent. If more than one name can be furnished, that should be done and in any event accused must be made to understand that appointed counsel is not advising him to retain any specific counsel, that he should consult several of the counsel named and that he should then make his own choice as to whom he will retain. If accused desires, it is entirely proper for appointed counsel to assist him by drafting letters or making phone calls to arrange for appointments with the civilian counsel accused desires to consult, or, as is more often the case, to request that civilian counsel visit the accused in the brig or stockade.

While the above procedures may suffice to handle the usual situation, the unusual sometimes occurs. For example, appointed counsel receives a long-distance phone call from accused's parents (living several thousand miles away) who state that they want to hire civilian counsel—"and please, can you give us the name of one"? Suggesting that they contact a hometown attorney so that he can handle the referral is not always a practical solution when time is of the essence. **If** possible, the names of several attorneys should be given them and the suggestion made that they telephone the attorneys. It may be appropriate to transfer the phone call to the local bar association referral service, if there is such a service. There can be no fixed solution to such problems: the appointed counsel must rely on his knowledge of local circumstances and practices, and on his own conscience.

Once the accused has selected a civilian counsel, he should be informed of his right to retain the appointed counsel as an associate counsel. Technically, the decision is his to make, but in practice it will be made for him by the civilian counsel. It may be that the civilian counsel is reasonably experienced in court-martial trial work, in which event he will want to handle the case and will make it clear that he desires to excuse appointed counsel. On the other hand, lack of military legal experience, or the nature of the case, may make individual counsel desire to retain military counsel as an associate. If this occurs, there should be a conference between the two counsel to discuss the case and reach decisions on certain pressing issues so that the case may be properly prepared for trial. There must be an immediate and clear understanding on which counsel is in charge of the case, on the status of the assisting counsel, and on how the work of preparing for trial is to be divided. These matters will be discussed at length in the following sections.

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### II. RELATIONS BETWEEN COUNSEL

#### A. *DIVISION OF EFFORT BETWEEN COUNSEL*

For the purposes of this discussion, it will be assumed that accused has designated individual counsel as chief counsel, so that appointed counsel is an associate. Thus, the terms "chief counsel" and "individual counsel" may be considered to mean the same counsel, as may "appointed counsel" and "associate counsel," unless otherwise specified.

Once the accused has designated individual counsel as chief counsel, the question of just what the associate counsel is to do must be resolved. In some situations an associate counsel may do no more than introduce the chief counsel to the court, having taken no part in preparation, and taking no part in presentation, of the case. In some situations an associate counsel may have done all the work in preparing for trial, and may also handle the trial personally, leaving the chief counsel in ominous silence beside his bulging brief case at the defense table.<sup>11</sup>

Accused and his counsel must discuss and decide just what the status of the associate counsel will be, and just how much he is to participate in the preparation and trial of the case. A clear understanding of the exact functions he will perform and the scope of his authority in representing the accused is essential to orderly and intelligent preparation and presentation of the case.

There is a view prevalent among military lawyers, or at least among those who have been exposed to marginal civilian practitioners, that since the civilian counsel is receiving a fee, he should earn it by doing all the work, and that if the accused happens to have retained a lazy and incompetent counsel it is of no concern to the appointed counsel. Those who subscribe to this view forget that the Congress has given the accused the *right* to the services of an appointed counsel, and has imposed a *duty* on the appointed counsel to serve as an associate counsel if accused so desires.<sup>12</sup>

Furthermore, the President has directed that :

When the defense is in charge of individual counsel, civil or military, the duties of defense counsel as associate counsel are those which the individual counsel may designate."

Accused's right to the assistance of the appointed counsel as an associate counsel does not depend on whether the individual counsel is receiving a fee. The associate counsel who is required to work late hours preparing a case for which an individual counsel is receiving a

<sup>11</sup> This may seem contradictory, but there is no requirement that chief counsel actively handle a trial: which counsel does the trial work is up to counsel and the accused.

<sup>12</sup> UCMJ, art. 38(b).

<sup>13</sup> MCM, 1951, para. 46d.

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fee can comfort himself with the knowledge that he is not doing the work to help the individual counsel, but to help the accused.

A corresponding view, prevalent among some less competent or conscientious civilian attorneys who occasionally appear in courts-martial, is that the Congress has given them a little "gravy" in allowing them the opportunity to appear for a fee, and at the same time providing an associate who can be made to do all the work and take all the needling without fear that he will demand a share in the fee or quit. That such an attitude is wrong goes without saying. An Army Board of Review pointed out that :

Individual counsel's assumption of such a position [that of chief counsel] and responsibility, however, cannot affect the appointed defense counsel's professional position by depriving him of or diminishing his status, dignity or responsibilities as an officer and an attorney. He does not thereby become a subordinate or clerk of individual counsel, required as an employee might be to follow instructions and do another's bidding in all things. To the extent that individual defense counsel desires the continued assistance of appointed military counsel, he should be prepared to treat him as an associate, an equal, and not an underling.

... If ... individual counsel and the accused chose to continue to avail themselves of the services of appointed defense counsel despite obviously divergent views, they should not now be heard to complain that his collaboration was less than satisfactory to all concerned."

### B. PLANNING THE PREPARATION AND TRIAL

Assuming that neither of the above extremes will occur, but that there will be some reasonable division of labor, the chief and associate counsel should discuss the situation and decide which of them will handle what part of the preparation and presentation of the case. The circumstances of the case, location of witnesses, distance from individual counsel's office to the post, base, or station at which the accused is being held and at which the trial will be held, and the relative experience of counsel will affect the ultimate decision.

Although there may have been a thorough investigation of the events leading to the charges on which the accused will be tried, further inquiry by the defense is usually necessary. It may be necessary to inspect the scene of the incident and examine any real evidence available. A search for more evidence and witnesses not already located may be called for. Whether individual or appointed counsel will investigate will depend on several factors: the proximity of the scene of the incident to either counsel's office, counsel's experience and inclinations, and the confidence or lack of confidence of each counsel in the merits of the case and the other counsel's ability.

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<sup>14</sup> CM 309453, Williams, 27 CMR 670, 672 (1959) : *per dictum*, 10 USMCA 682, 27 CMR 512 (1959).

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In any case, sound preparation must include searching interviews with all the witnesses, particularly the accused. Obviously, the location of the witnesses and the amount of time each counsel has to devote to preparation will govern which counsel handles which witness.

In some cases extensive research and correspondence may be necessary. The nature of the research, availability of research sources, and availability of stenographic and clerical assistance to counsel must be considered in working out a division of effort that will insure thoroughness without duplication. Since few civilian attorneys have ready access to military law reports, most of the research in these materials should be done by military counsel.

At various times in the course of preparing for trial, it is necessary for the defense to approach the prosecution to make inquiries or requests, or to open negotiations. It may be necessary to inquire about availability of witnesses or documents, or about the prosecution's readiness (so that a trial date can be discussed), or about the prosecution's willingness to enter certain stipulations. If the defense wants the government to obtain documents or witnesses it is necessary to ask for them. Accused may want to explore the possibility of a negotiated plea, in which case the accused and his counsel must make the initial approach. In any such case the logical person to approach the prosecution or the convening authority, is the appointed counsel, since he is on the scene and is acquainted with the opinions and attitudes of the people with whom he must negotiate.

If associate counsel and the convening authority reach some tentative agreement which is then repudiated by accused and chief counsel there is a danger that any further attempts by accused to continue negotiations will be rebuffed by the convening authority. For this reason, it is essential that the scope of the associate's authority in any dealings with the government be clearly defined.

The selection of tactics to be used at the trial should be the result of thorough discussion between both counsel, although the chief counsel must make the final decision where agreement cannot be reached. Which counsel will conduct the trial will depend at least in part on how the chief counsel happens to feel about his abilities and the abilities of his associate counsel. If the individual counsel has had experience in courts-martial, he probably will want to run the whole show; if his experience is slight, he may want the appointed counsel to conduct at least the preliminary proceedings up through arraignment. If there has been a division of labor in interviewing witnesses and investigation, it seems logical to leave examination and cross-examination of witnesses to whichever counsel happened to interview the particular witness. There are some civilian counsel who prefer

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to leave the conduct of the entire trial to appointed counsel, participating only by making an argument to the court. Whatever the plan may be, it must be agreed on before the trial ever commences if confusion and risk are to be avoided.

In addition to a clear tactical plan, it is essential that the associate counsel have a clear understanding of the chief counsel's theory of the case. If the chief counsel fails to reveal his theory to his associate, he may find himself in the position of the individual counsel who, after rigorously defending an accused on one theory, and then acceding to appointed counsel's request to make a brief statement on behalf of the accused, found himself listening to the appointed counsel demolishing the defense by comments completely inconsistent with the individual counsels' theory.<sup>15</sup>

### *C. CIVILIAN COUNSEL'S USE OF GOVERNMENT FACILITIES*

During preparation for trial, it may be desirable or even necessary for the chief counsel to make some use of government facilities and services. If the accused is confined, counsel must be permitted to use some quiet and private place to consult with him. Most brigs and stockades provide this service as a matter of course; if it cannot be provided at the brig, it is customary for appointed counsel to have the accused brought to his office for consultations with the chief counsel.

Other services and facilities, ranging from use of the government's law library to use of government employees (for stenographic purposes, etc.), or use of government transportation, quarters, or messing facilities, may be necessary. If the chief counsel's office is located within a reasonable distance of the post or base, he should be expected to provide his own transportation and stenographic service. However, if the post is remote, it may be convenient for chief counsel to use government messing facilities, and even government stenographic services.

In most situations the appointed counsel will treat civilian counsel as a guest and see to it that he has a place to hang his hat, rest his briefcase, interview witnesses and work on his notes. If counsel needs to have a letter or statement typed, the appointed counsel sees to it, and when mealtime approaches he takes the chief counsel to the mess as his guest.

Obviously, civilian counsel cannot be expected to be welcomed if he makes himself a fixture in his associate's office. He must realize that most legal offices have many cases in various stages of preparation

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<sup>15</sup> *United States v. Walker*, 3 USCA 355, 12 CMR 111 (1953).



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or trial as well as other legal matters which must be taken care of. He can't expect to monopolize his associate's time, nor can he expect the office to drop everything else to work for him. Any reasonable request is usually granted as a matter of course, but unreasonable demands may generate hostility which will **work** to his disadvantage.

When the trial commences, it is obvious that the civilian counsel will have to stay in the courtroom for as long as the court is in session, and in the legal office during recesses. If he needs stenographic assistance at such times it should be furnished if at all available. If the trial is being held at some location remote from civilian facilities and lasts for more than one day, it may be necessary to provide civilian counsel with quarters in a guest house or bachelor officer's quarters.

If the trial is being held at a place which cannot be reached by commercial or private transportation, it will be necessary for the government to provide the necessary transportation. If the means of transportation are within the control of the convening authority or some other local authority, there should be no difficulty in arranging for their use. If the trial is to be held on a ship in the middle of a harbor the convening authority can certainly arrange for a boat to take the civilian counsel out to the ship. However, if use of the transportation (for example, use of Military Air Transportation Service aircraft) requires some special authorization, the civilian counsel will have to request that authority from the military department concerned.<sup>16</sup> The Judge Advocate General of the Army has taken the view that requests for no-cost transportation by counsel should be denied, and that requests for transportation on a cost basis should be denied unless other transportation is not adequate and mill not be available within the next 60 days, and unless use of government transportation is in the national interest.<sup>17</sup>

Since Article 38 of the Code provides for the accused's right to retain civilian counsel at his own expense, it is submitted that the government cannot deny the accused that right by conducting his

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<sup>16</sup> Army Regs. No. 59-12/Navy Publication OPNAV Instruction No. 4630.12A/Air Force Reg. No. 76-15/NAVMC Reg. No. 2536 (Nov. 5, 1959) provides for Military Air Transportation Service carriage of passengers at government expense where authorized by the interested department as primarily of official concern to the Department of Defense, or at the individual's expense where the department authorizing the travel certifies that it is in the national interest and that commercial transportation is not available, readily obtainable, or satisfactorily capable of meeting requirements. Army Regs. No. 55-107/Chief of Naval Operations Letter Serial 1414P40/Air Force Reg. No. 75-48 (Sept. 20, 1950) authorizes Military Sea Transportation Service carriage of civilian passengers on a commercial basis under unusual circumstances where authorized by a department and where the passenger presents substantial evidence that commercial service is not available.

<sup>17</sup> JAGJ Correspondence re : Specialist Fourth Class William G. Tefft, Oct. 27, 1958. Sote for Retained Copies ; JAGJ Miscellaneous File Opinion, June 27, 1958.

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trial at a place inaccessible except by government transportation and then denying counsel the use of that transportation on a cost basis. In such a case the government has the choice of allowing civilian counsel to use government transportation or moving the trial to some place which can be reached by non-governmental transport.

In most situations arrangements for use of government services and facilities will be made by the appointed defense counsel as a matter of courtesy, but if the approval of the Staff Judge Advocate or Staff Legal Officer is required, the individual counsel may face the attitude that since he is receiving a fee, he is not entitled to anything from the government.

Such hostility may be understandable, but it indicates a lack of understanding of the meaning of certain of the requirements of the Code.

Article 38 provides that accused has a right to be represented by civilian counsel if provided by him, and that accused also has a right to be represented by appointed counsel whom he may retain to act as associate counsel. The Code thus contemplates that the accused must retain, and pay, his own counsel if he desires civilian representation. It does not follow that accused is not entitled to the use of government facilities by his appointed counsel when he retains a civilian counsel. It would seem only logical that if accused is entitled to retain appointed counsel as associate counsel, he is entitled to have associate counsel use any government facilities which he would use if there was no civilian counsel participating in the trial. If government facilities may be used by appointed counsel for accused's benefit, such facilities should be available to civilian counsel for accused's benefit, if his use of such facilities is necessary and they are reasonably available.

To refuse the use of necessary facilities to civilian counsel merely because he is receiving a fee is, in effect, the imposition of an indirect penalty on the accused for his choice of counsel. Any limitation on the use of government facilities by individual counsel should be based on reasonable availability of the facilities, or on statutes or regulations prohibiting their use by civilians, rather than on the fact that he is a civilian counsel, or that he is receiving a fee.

When the civilian counsel is permitted to use government facilities and services, it seems only reasonable that he should adjust his fee accordingly. In setting the fee he will charge the accused, he should take into consideration not only the factors listed in Canon 12 of the American Bar Association's Canons of Professional Ethics, but also the value of the assistance he has received from the government. The major portion of this assistance will be the services of appointed counsel. If appointed counsel was a civilian he would be entitled to a fee

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for his services; ~~as~~ a member of the armed forces he is prohibited from accepting any such fee.<sup>18</sup> Since this is the case civilian counsel should reduce the amount of their fee by an amount corresponding to the reasonable value of the facilities and services furnished by the government.

### D. AVOIDING CONFLICT

Whenever two attorneys are required to work together on a case, conflicts in viewpoint are, as previously stated, inevitable. Fortunately, most conflicts are resolved amicably and do not interfere with representation of the client's best interests. If both attorneys approach these differences with a sincere desire to do the best possible job for their client consistent with legal and ethical requirements, most if not all conflicts will be avoided. Any attorney who enters into an association with the purpose of imposing his views on his associate while ignoring the associate's views lacks understanding of the basic purpose of an association of counsel, and may be putting his own self-esteem before the interests of his client. The accused has retained two counsel because he believes that the ability and experience of one counsel will complement the ability and experience of the other—that two heads are better than one—and that through the joint effort of the two counsel he will be more skillfully represented than he would be by either counsel acting alone. Accused will receive this type of representation only when each counsel is willing to give open-minded consideration to the views of the other counsel.

Although each counsel has a duty to enter the association with an open mind and to give full consideration to the other's views, one counsel must, as previously stated, be in charge. However, neither counsel is required to abdicate all responsibility for planning, preparing and conducting the trial to the other merely because the other has been designated by the accused as chief counsel. Associate counsel must be prepared to advocate adoption of his views forcefully, until he is convinced that the other counsel's views are better or until a decision in favor of one view or the other has been made by the accused or the chief counsel. What action may be taken after such a decision remains to be seen.

### E. HANDLING CONFLICTS

Further discussion of the methods of dealing with conflicts between counsel requires a division of conflicts into three classes: (1) differences of opinion on legal theories, (2) differences on matters of

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<sup>18</sup> MCM, 1951, para. 48a.

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tactics, and (3) differences which involve a question of ethics. These classifications cannot be rigid. For many differences of opinion may contain elements of each category. However, such a classification will aid in analysis of methods of dealing with conflict.

Treatment of differences of opinion on legal theories should give little difficulty in most cases. Where counsel disagree on matters of law, comparison of the results of each counsel's research should **allow** an agreement between the two counsel on the view most appropriate to the theory of the defense. When an agreed-on position cannot be reached, the chief counsel must make a decision. There is no point in taking such an issue to the accused for his decision, for unless the accused is also an attorney, he is incompetent to make any such decision.

Unfortunately, differences of opinion on legal theories may result in differences on the appropriate tactics for the defense. When a disagreement on a matter of tactics arises, it is necessary for counsel to evaluate the expected prosecution evidence and tactics, and the expected defense evidence, and determine which of the proposed defense tactics is most advantageous. Most counsel have a predilection for certain tactics with which they have had success in the past: for this reason each counsel must be careful to keep an open mind in evaluating the other counsel's proposal. If no agreement can be reached by the counsel, the chief counsel must make a decision, and the associate must conform.

Should a difference of opinion on tactics involve a matter vital to the interests of the accused—and most tactical issues will—the matter must be presented to the accused for his decision. The accused has a right to be informed of the conflict, to be advised of the considerations which affect his decision and the results that may flow from the alternatives, and to make the decision.<sup>19</sup>

Once the accused has made a decision, counsel must accept it, unless

the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is **his duty** to ask the client to relieve him.<sup>20</sup>

To continue to dispute the decision may confuse the accused to the point that he is unable to make an intelligent decision and may result in a denial of the fair trial to which he is entitled. In one extreme case in which accused's individually-retained counsel and court-appointed associate counsel engaged in continuous disagreement and wrangling during the trial, the Supreme Court of Ohio ruled that :

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<sup>19</sup> American Bar Ass'n, Canons of Professional Ethics, Canon 7.

<sup>20</sup> *Ibid.*

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The defendant's unfamiliarity with court procedure . . . placed him absolutely at the mercy of his counsel and their ~~serious~~ and prejudicial wrangling . . . he was at times unable to decide as to whose advice to follow, and . . . he complained thereof, telling his counsel that he was unable to know what to do, or what course to pursue, on account of their contrary advice . . . Upon the whole record . . . it is apparent that defendant did not have that fair trial . . . that the constitutional guaranties contemplate . . . that substantial justice has not been done according to due process ~~of~~ law.<sup>21</sup>

When a conflict has arisen between counsel, and one counsel believes that an ethical issue is involved, it is incumbent upon that counsel to bring to co-counsel's attention the nature of the ethical conflict. Neither counsel wants to act unethically, but since lawyers differ on their interpretation of the Canons of Ethics, it is not impossible that an ethical disagreement will arise.

Although chief counsel may have the authority to decide legal and tactical issues arising between counsel, he cannot decide an ethical issue for another counsel. By the very nature of a Code of Ethics, each individual must decide for himself whether his conduct meets the standard. His decisions may be subject to review by a Grievance Committee or a court, but no other counsel may make his ethical decisions for him.<sup>22</sup>

The Canons of Ethics make it quite clear that although the accused may have the right to decide material issues concerning the conduct of his trial, his decisions cannot require counsel to deviate from ethical standards.<sup>23</sup>

The Canons contemplate only one remedy for the counsel whose judgment on a tactical ~~or~~ ethical issue has been overruled, and that is withdrawal from the case.<sup>24</sup> This remedy may not be available to an appointed defense counsel. Whether appointed counsel has a right to withdraw over accused's objection will be discussed in the next section. It is clear that accused can consent to appointed counsel's withdrawal,<sup>25</sup> but if he refuses to excuse appointed counsel, accused and individual counsel cannot expect wholehearted cooperation from an unwilling associate.<sup>26</sup>

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<sup>21</sup> *Cornwell v. State*, 106 Ohio St. 626, 140 N.E. 363 (1922).

<sup>22</sup> The Canons contain no specific provision to this effect, but the frequent references to the lawyers "own conscience" (Canon 15), "the lawyer's conscience" (Canon 18), "his own sense of honor and propriety" (Canon 24), and "his own responsibility" (Canon 31), permit no other interpretation.

<sup>23</sup> Canons 15, 16, 18, 24, 31, 44.

<sup>24</sup> Canons, 7, 44.

<sup>25</sup> UCMJ, art. 38(b); MCM, 1951, paras. 46c, 61f(3) and app. 8a at 503.

<sup>26</sup> See CM 399453, Williams, 27 CMR 670 (1959); pet. *den.*, 10 USCMA 682, 27 CMR 512 (1959), and note 14, *supra*.

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### 111. WITHDRAWAL BY APPOINTED COUNSEL

#### A. *May Appointed Counsel Withdraw Over Accused's Objection?*

To set the stage for further discussion of the problems arising out of a conflict between counsel, let us assume that a difference of opinion on a matter of tactics has arisen between counsel, that the accused has chosen to adopt the position proposed by chief counsel, and that the associate counsel believes either: (1) that the difference is such that he can no longer effectively cooperate in representing the accused, or (2) that he cannot participate further without violating some ethical requirement. The Canons referred to previously<sup>27</sup> provide that he should withdraw from the case; whether the Code and *Manual* permit such withdrawal remains to be seen.

There can be no doubt that an appointed counsel may withdraw from a case with the accused's consent.<sup>28</sup> At any time accused may excuse his appointed counsel whether or not appointed counsel desires or requests relief. If he excuses appointed counsel before trial it will be necessary for the accused to make a statement at the trial that he does not desire the latter's services.<sup>29</sup> When a situation such as that described in the assumption stated above has developed, it is difficult to understand why an accused would refuse to excuse the appointed counsel. Surely an individual counsel will not want an associate who cannot cooperate, and will recommend that he be excused. An individual counsel who has been told that he is, in the opinion of the associate, proceeding unethically would certainly want the associate dismissed post-haste. However, in the event that the accused has refused to consent to the associate's withdrawal, a difficult problem is encountered.

In determining whether appointed counsel has a right to withdraw over accused's objection, an analogy may be drawn with the rule generally followed in civilian courts, particularly in criminal trials involving assigned counsel or a public defender. It is well established that a lawyer may withdraw from a case for good cause,<sup>30</sup> returning any part of the retainer not clearly earned.<sup>31</sup> It is generally agreed that a trial judge may, for good cause shown, excuse an assigned counsel or a public defender, after giving the defendant an opportunity to be heard, and after providing for another counsel.<sup>32</sup>

<sup>27</sup> See note 24 *supra*.

<sup>28</sup> See note 25 *supra*.

<sup>29</sup> MCM, 1951, app. 8a at 503-504.

<sup>30</sup> Canon 44.

<sup>31</sup> *Ibid.*

<sup>32</sup> MODEL DEFENDER ACT § 5, adopted by the National Conference of Commissioners on Uniform State Laws in August 1959, as reported in 43 J. AM. JUD. SOC'Y. 95 (1959); *Conimonwealth v. Strada*, 171 Pa. Super. 358, 90 A. 2d 335 (1952).

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In a military trial, whether or not an appointed counsel may withdraw is complicated by several factors not found in civilian trials. First of all, Congress has provided that a defense counsel must be appointed, and that he must act if accused requests his services even though accused has retained individual counsel.<sup>33</sup> Furthermore, it should be noted that paragraph 48c of the *Manual*, in restating portions of the Canons, substitutes the word "duty" for "right" in Canon 5, and provides "It is his *duty* to undertake the defense regardless of his personal opinion as to the guilt of the accused."<sup>34</sup>

Secondly, when the convening authority appoints counsel, he is ordering the person appointed to act as counsel, and as a military offices counsel is obligated to carry out orders.

Whether an appointed counsel may withdraw over accused's objections has never been raised before a Board of Review or the Court of Military Appeals, but it is submitted that in certain circumstances a law officer would be justified in excusing appointed counsel over accused's objection.

It seems clear that, although Congress intended to guarantee adequate representation to each accused, it did not intend that such guarantee would operate to require the counsel to commit a breach of ethics or participate in a crime. It is unthinkable, the clear language of the Code and Manual notwithstanding, that the drafters of the Code and the Manual intended to permit an accused to force an appointed counsel into a position where he had to be actively unethical or silently acquiescent. Furthermore, it is clear that although an appointed counsel has an obligation to obey the orders of his superior, he can always go to the convening authority before trial and ask to be relieved. If the convening authority consents, no problem exists. If he refuses, and counsel still feels that he cannot participate in the trial, appointed counsel need not participate in a crime to obey the convening authority's order. For these reasons, a law officer may be justified in excusing appointed counsel over accused's objection in spite of the provisions of the Code and Manual, and in spite of the fact that a superior has ordered the counsel to perform and has not consented to his being excused.

### B. BASIS FOR ALLOWING WITHDRAWAL

The appointed counsel's request to withdraw may be granted by the law officer upon a showing of proper justification—the "good cause"

<sup>33</sup> UCMJ, arts. 27, 38.

<sup>34</sup> MCM, 1951, para. 48c (emphasis added). See Avins, *Duty of a Military Defense Counsel to an Accused*, 58 MICH. L. REV. 347 (1960). Avins points out this language as one of the bases for his contention that military counsel must take all cases assigned, subject only to his right to request relief and his duty to disclose his disqualifications to accused.

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referred to in Canon 44. It seems obvious that not every petty disagreement will justify withdrawal; on the contrary, a law officer must require counsel to justify his request by demonstrating that denial of the request will be detrimental to the counsel's honor or self respect.<sup>35</sup> As stated previously, the language of the Code clearly indicates an intent on the part of Congress that an accused have the benefit of the assistance of appointed counsel in all cases; only an extreme conflict between counsel and accused can justify a departure from this intent.

The Canons recognized two basic reasons for withdrawal by counsel: (1) a tactical disagreement making it impracticable for the counsel whose judgment has been overruled to cooperate effectively,<sup>36</sup> and (2) an ethical conflict.<sup>37</sup> To date there have been no military decisions containing any discussion of the grounds which would justify withdrawal by appointed defense counsel. but enough has been said in a few decisions to predict that the Court of Military Appeals is likely to recognize the two grounds contained in the Canons.

### 1. *Tactical Conflict*

In *United States v. Bell*,<sup>38</sup> the Court was faced with withdrawal of appellate defense counsel with accused's consent, which left accused without representation before the Board of Review. Judge Latimer's opinion, in which Chief Judge Quinn concurred, stated that accused was "obstreperous" in his relations with his two appellate counsel and that there were various conflicts over tactics and the nature of assignments of error. When accused desired to disniiss his counsel the Judge Advocate General stated that he would not appoint any more counsel.<sup>39</sup> The majority held that the Board of Review erred in relieving appellate counsel and disposing of the case without timely notice to the accused and without taking some measures to protect the accused's right to some representation. Thus, by implication the Court approved withdrawal by appellate counsel, finding error only in the Board's actions after withdrawal. Furthermore, the opinion contains dictum to the effect that a sane accused can always forfeit the right to representation before a Board, and that an arbitrary and calculated refusal to accept appellate counsel may constitute abandonment of such right. Judge Ferguson, concurring in the result, thought it unwise to tell the accused he could not reject the new representative (at the ordered rehearing before the Board of Review) unless he wanted to be unrepresented. He stated:

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<sup>35</sup> Canon 44.

<sup>36</sup> Canon 7.

<sup>37</sup> Canon 44.

<sup>38</sup> 11 USCMA 306, 29 CMR 122 (1960).

<sup>39</sup> *Id.* at 309.29 CMR at 125.



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It would be ruinous to the public defender concept thus enacted by the Congress to permit the Judge Advocate General to refuse to appoint new legal representatives for the accused only because there had been a tactical disagreement between the parties.”

Judge Ferguson's statement indicates that while he does not consider a tactical disagreement ground for withdrawal by appellate counsel, he may find that a withdrawal based on other than a tactical conflict is proper. The only other ground possible is an ethical conflict. Too much reliance cannot be placed on this decision, for in *Bell*, the Court was concerned with withdrawal of appellate counsel with accused's consent. However, it does indicate recognition that a tactical conflict is ground for withdrawal of counsel. Furthermore, it gives some indication that the Court will not interpret Article 38(b) of the Code as requiring the accused's consent before counsel may withdraw. Article 70 of the Code, giving the accused a right to appellate counsel, is similar in concept to Article 38, for it provides that appellate counsel shall be appointed and shall represent the accused at his request, and that the accused shall have the right to be represented by civilian appellate counsel if provided by him. It is significant to note that in *Bell* the accused had consented to withdrawal of the assigned appellate counsel but apparently desired that the Judge Advocate General assign another counsel. The Court was not so much concerned with the necessity for another assigned appellate counsel as it was with the Board's disposing of the case without timely notice to the accused and without taking measures to protect accused's right to *some* representation. Judge Latimer's dictum concerning an accused forfeiting his right to assigned counsel is also significant. In view of the above, it is believed that the Court will allow withdrawal by appointed *trial* defense counsel over accused's objection so long as accused has *some* representation (either individual or another appointed counsel) when there has been a tactical disagreement to the extent that accused may be said to have forfeited his right to the service of appointed counsel as an associate.

### 2. Ethical Conflict

In *United States v. Winchester*<sup>41</sup> the Court of Military Appeals was presented with an individual military defense counsel's attempt to withdraw after an ethical conflict had arisen. Counsel had charged his accused with committing perjury and had asked to withdraw; his request was denied by the law officer. The Court's decision neither approved nor disapproved the law officer's action, but turned on the prejudicial effect of counsel charging accused with perjury in open

<sup>40</sup> *Id.* at 313, 29 CMR at 129 (emphasis added).

<sup>41</sup> 12 USCMA 74, 30 CMR 74 (1961).

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court and on his inadequate representation of accused after his request was denied.

Chief Judge Quinn's dictum (in which Judges Ferguson and Lattimer apparently concurred) :

if counsel said nothing and it was known to the authorities that accused's testimony was false, his silence might be misconstrued as approval of the deception, and he might become personally involved. Counsel's consternation at the unexpected action of the accused is, therefore, understandable. However, the form of his response to the situation was erroneous.<sup>42</sup>

did hold out the possibility that counsel could have taken some action to protect himself against accused's perjury. What action he might or should have taken was not indicated. Since the Court's major concern was counsels' subsequent inadequate representation, it is believed that the Court would have approved the law officer's *granting* of the request to withdraw, so long as there was some action to provide another counsel for accused. The one other objection—the possibility that charging the accused with perjury in the presence of the court created prejudice—could have been eliminated had counsel made his request out of the hearing of the court.

It must be emphasized that the *Bell* case involved withdrawal of appellate counsel *with* accused's consent, leaving accused *without representation*, and that *Winchester* involved an *attempt* to withdraw by individual counsel followed by *inadequate representation*. When an appointed trial defense counsel is allowed to withdraw, certainly no problem of lack of representation can arise so long as accused's individual counsel continues to function, and certainly an excused counsel cannot thereafter be guilty of inadequate representation. If his request to withdraw was made out of the hearing of the court, there can be no prejudice resulting from the language of the request.

### C. THE MECHANICS OF WITHDRAWAL

The procedure for withdrawal is fairly simple. If the appointed counsel wishes to withdraw before trial he may request that the convening authority relieve him, and the convening authority cannot "capriciously refuse this request if the needs of the accused can otherwise be satisfied."<sup>43</sup> The convening authority may issue an order amending the appointing order by relieving one counsel and appointing another.<sup>44</sup> If the convening authority refuses to relieve appointed counsel, counsel may still ask the accused to excuse him.

<sup>42</sup> *Id.* at 78, 30 CMR at 78.

<sup>43</sup> Arins, *supra* note 34, at 356.

<sup>44</sup> MCM, 1951, para. 37.

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Once the trial has commenced the appointed counsel may move to withdraw. Any such motion should be made out of the hearing of the court to avoid any possibility of prejudice. After a hearing, the law officer may excuse appointed counsel if he finds that good cause for such action has been shown, whether accused consents or objects. Since excusing counsel is discretionary, the law officer may refuse to grant a motion to withdraw even though the accused has consented.<sup>45</sup>

### D. SOME HAZARDS INVOLVED IN MOVING TO WITHDRAW

Whenever appointed defense counsel has been put in a position which causes him to desire to withdraw during the trial, he faces certain ethical problems in making the request to withdraw. The law officer who is confronted with such a request also faces certain problems in handling the request.

#### 1. *Adverse Impression*

One immediate problem is the necessity of avoiding the adverse impression which may be created in the court members' minds by a disclosure of the grounds for requesting withdrawal. There is no way to prevent the court members from noticing, and perhaps drawing inferences from, the sudden withdrawal of one counsel, but use of an out-of-court hearing will minimize the possibility of prejudice.

#### 2. *What Is Good Cause?*

Once the appointed defense counsel makes his request to withdraw, he must present matters which he considers to be good cause for the request. In the present state of the law, it appears that the Court of Military Appeals lacks sufficient confidence<sup>46</sup> in military counsel

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<sup>45</sup> In *United States v. Howell*, 11 USCMA 712, 29 CMR 528 (1960), accused stated that he desired to discharge both the individual and appointed defense counsel. The law officer released them but directed that appointed counsel remain in the courtroom in case the accused wanted advice. Individual counsel volunteered to remain. Although the court did not comment on this point, it is clear that the law officer has the authority to require appointed counsel to remain, and it seems that he has the inherent authority to require civilian individual defense counsel to remain once civilian counsel has entered an appearance and submitted himself to the court's authority. If the civilian counsel refused to comply with the law officer's order in such a manner that his actions amounted to contempt, the law officer could initiate contempt action, under Art. 48, UCMJ. If the civilian counsel's actions were not contemptuous, the law officer could recommend to the convening authority that action to suspend counsel be initiated, under the provisions of para. 43, MCM, 1951, and § 0135b, Navy JAG Manual (Nov. 1, 1961), or Special (Army) Regs. No. 22-130-6 (Mar. 26, 1951), as appropriate.

<sup>46</sup> A discussion of the Court's attitude toward military defense counsel is beyond the scope of this article. However, the trend of the Court's decisions has caused at least some appointed defense counsel to be fearfully hesitant in

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to permit withdrawal based on a mere statement such as, "I request to withdraw from further participation due to certain ethical considerations arising from matters which I do not wish to disclose." Be that as it may, it is doubtful whether any law officer would grant a request for withdrawal without being given some concrete reason for withdrawal. When counsel is required to give reasons, he is confronted with the limitations of the attorney-client privilege, and with his duty of undivided loyalty to the accused.

### 3. *Attorney-Client Privilege*

Assuming that appointed counsel desires to withdraw because of something accused or individual counsel has done or intends to do, it is most likely that his knowledge of the impropriety of the action will be based on communications from the accused, or from individual counsel, or from both. In such case, the provisions of Canon 37 (Confidence of a Client) come into conflict with Canon 15 (How Far a Lawyer May go in Supporting a Client's Cause), Canon 16 (Restraining Clients from Improprieties), Canon 22 (Candor and Fairness), and Canon 29 (Upholding the Honor of the Profession).

In discussing the question of the proper action for an attorney whose client (in a criminal case) has told the court that he has no prior criminal record when the attorney knows such statement to be false, the American Bar Association Committee on Professional Ethics and Grievances took the position that Canon 37 would prevent the attorney from disclosing his client's prior record if it had been communicated to counsel by the accused while seeking advice, even if the accused had committed perjury.<sup>47</sup> If counsel had learned of accused's record without a communication from accused, the majority of the Committee felt that Canon 37 was inapplicable, leaving only a conflict between Canons 6 (Loyalty to Client) and 22 (Candor and Fairness). One member of the committee thought Canon 37 applied to all information received by Counsel, whether or not communicated by the accused, and that accused's record was a secret which counsel had to preserve. Two other members of the committee took the position that Canons 29 (Reporting Perjury) and 41 (Reporting

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asserting their own views when dealing with accused, and to deal with accused at arms length, scribbling self-protecting memoranda for their files and mentally planning their defense against accused in the event that on appeal he turns on them with claims of inadequate representation. When military counsel realize that the Court will treat them on a par with civilian counsel and will recognize their right to withdraw for good cause, appointed defense counsel will be encouraged to be more confident and independent in their representation of accused. This can only result in a higher standard of representation, which is the basic desire of the Congress, the Court of Military Appeals, and counsel.

<sup>47</sup> Am. Bar Ass'n, Opinions of Committee On Professional Ethics and Grievances, No. 287, at p. 614 (1957).

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Fraud and Deception) controlled; that Canon 37 was not superior to Canons 15, 22, 29, and 41; and that counsel was under a duty to urge accused to tell the truth and if accused refused, to do so himself.

In *United States v. Winchester*<sup>48</sup> the Court of Military Appeals discussed an analogous situation. The Board of Review had held that individual counsel's action in that case had violated the attorney-client privilege but that the convening authority's reduction of the sentence (pursuant to a pre-trial agreement) had eliminated the prejudice. The Court (speaking through Chief Judge Quinn) decided that counsel's action charging the accused with perjury in open court was error, stating that, for one thing, the existence of a previous statement inconsistent with the accused's testimony did not establish which statement was true. The Court also pointed out that the attorney-client privilege had not necessarily been violated—that if the accused had told counsel one story to relay to the convening authority in negotiating for a pre-trial agreement, such statement was not privileged.

However, in *United States v. Daniels*,<sup>49</sup> Judge Latimer's concurring opinion (in which Judge Ferguson also concurred) stated that a stipulation of facts entered into in connection with a negotiated guilty plea could not be used to impeach the accused at a rehearing at which the accused had pleaded not guilty.<sup>50</sup> He reasoned that since the Government could not tell the court that the accused had pleaded guilty at the former trial,<sup>51</sup> and since such stipulations are often entered into as a part of pre-trial agreement procedures (to furnish reviewing authorities with information necessary for assessment of sentence appropriateness) the plea and the stipulation "are so closely woven into a single judicial act that they should be measured by the same rule."<sup>52</sup> From this point, it is a very short step to the view that communications addressed to the convening authority by the accused in the course of negotiations for a pre-trial agreement also are a part of that "single judicial act," and cannot be used against him in a subsequent trial. Thus, such statements may be privileged for one purpose and not privileged for another.

So far as the attorney-client privilege is concerned, the privilege does not apply if the accused's communication relates to some proposed crime. It should be noted that if accused tells his attorney that he intends to tell a certain story on the witness stand although he knows that a different version of the facts is the truth, his communication relates to a proposed crime, and is not privileged. On the

<sup>48</sup> 12 USCMA 74, 30 CMR 74 (1961).

<sup>49</sup> 11 USCMA 22, 26, 28 CMR 276, 280 (1959) (concurring opinion).

<sup>50</sup> *Id.* at 25, 28 CMR at 279.

<sup>51</sup> Citing *Kercheval v. United States*, 274 U.S. 220 (1927).

<sup>52</sup> 11 USCMA at 27, 28 CMR at 281.

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other hand, if the accused tells his attorney one story prior to trial and then testifies differently, his pre-trial statement does *not* relate to proposed perjury, although it may be evidence of perjury.<sup>53</sup> In addition, the privilege does not protect communications not intended to be held in confidence. In such situations the counsel should be permitted to make disclosure, but if the information upon which counsel bases his request to withdraw is privileged, disclosure is prohibited. The majority of the Committee on Ethics was of the opinion that counsel should urge the client to tell the truth and if he refuses, should sever relations but should not violate his confidence.<sup>54</sup>

### 4. *Opportunity to be Heard*

One final matter which must be taken care of by the law officer is that of seeing that the accused and individual counsel are given an opportunity to be heard in reply to appointed counsel's motion.<sup>55</sup> Only after a full hearing should the law officer rule on the motion. In the event that the motion is granted, the appointed counsel is excused, and the trial proceeds without him. Individual counsel may use this development as grounds for requesting a continuance. Since we are assuming that individual counsel is the chief counsel there should be no need to grant a continuance merely because an associate has withdrawn, but the circumstances of a particular case may justify a Continuance.

## E. THE EFFECT OF WITHDRAWAL

Whenever appointed counsel is permitted to withdraw over accused's objection it is certain that such action will be assigned as an error by individual or appellate defense counsel. Whether or not permitting withdrawal is erroneous will depend on the circumstances of the particular case, but certain factors common to all such cases must be considered in determining the effect of withdrawal.

An argument, based on Articles 27 and 38 of the Code, that withdrawal of appointed defense counsel creates a jurisdictionally defective (improperly constituted) court may be resisted on several

<sup>53</sup> *United States v. Winchester*, 12 USCMA 74, 30 CMR 74 (1961).

<sup>54</sup> Opinion No. 287, *supra* note 47.

<sup>55</sup> *Commonwealth v. Strada*, 171 Pa. Super. 358, 90 A. 2d 335 (1952), which held that permitting counsel to withdraw "in the absence of the client and without notice to him and without his having the opportunity of being heard in the matter" was error. The circumstances indicated an effort by accused and counsel to generate error. After continuances, accused and two counsel appeared and requested another continuance. On denial counsel moved to withdraw. This motion was granted in accused's absence. Accused refused offer of assigned counsel and pleaded not guilty. Fifteen minutes after verdict, typed motions for new trial, signed by counsel, were submitted.

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grounds. One argument may be based on the Manual provisions<sup>56</sup> making only the original appointment of defense counsel jurisdictional, and on the general rule that an accused cannot confer jurisdiction on a court by consent.<sup>57</sup> If an accused cannot confer jurisdiction on a court by his consent to counsel's withdrawal, it must follow that he cannot remove jurisdiction by refusing to consent to withdrawal. Another argument stated previously is that Congress intended Articles 27 and 38 of the Code to guarantee every accused the services of counsel but could not have intended to allow an accused to abuse the right by requiring appointed counsel to act unethically.

Another argument likely to be advanced by the accused and his appellate counsel is that withdrawal of appointed defense counsel amounts to a denial of military due process. The Court of Military Appeals should not extend the concept of military due process to the point of requiring an appointed counsel to compromise his self-respect or honor by participating in a trial against his will, particularly when individual counsel is available to continue representing the accused. Judge Ferguson's language in his concurring opinion in *United States v. Bell*<sup>58</sup> to the effect that, in the *absence of fraud*, an attorney must normally present the contentions of his client, indicates a recognition that an accused does not have the right to insist on his appointed defense counsel's participation in fraud.

Whether or not withdrawal of appointed defense counsel has resulted in specific prejudice to the accused must, of course, depend upon the particular circumstances of the case. Each such case must be examined to determine whether the *method* of withdrawing created a prejudicial impression in the minds of the court, and whether the accused would have benefited from the continued presence of the appointed counsel.<sup>59</sup>

### IV. ACTION OTHER THAN WITHDRAWAL

Closely connected with the problem of withdrawal of appointed defense counsel are certain ethical and procedural problems involved in taking other action if withdrawal is denied. For example, if appointed counsel's request is denied, may he make a statement for the record dissociating himself from further participation in the trial, or must he remain silent? If he remains silent, must he actively participate or may he adopt a passive role, mentally dissociating himself from further participation in the trial? Aside from any other

<sup>56</sup> MCM, 1951, para. 61f. Cf. CM 357972, McCarthy, 7 CUR 329 (1953).

<sup>57</sup> MCM, 1951, paras. 68b, 70a.

<sup>58</sup> 11 USCMA 306, 313, 29 CMR 122, 129 (1960).

<sup>59</sup> In this regard, see the language of CM 399453, Williams, 27 CNR 670 (1959), *pet. den.*, 10 USMCA 682, 27 CMR 512 (1959), quoted *supra* at page 42.

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action at the trial, is counsel under any duty to report the misconduct of either the individual, counsel or the accused? Whether any definitive answers to these problems can be stated is questionable.

### A. WHAT ELSE MAY COUNSEL DO?

If appointed defense counsel cannot disclose his reasons for desiring to withdraw without violating Canon 37, and for that reason does not even request to withdraw, or if he does make a request which is denied either because the reasons cannot be stated or because the law officer does not think that the reasons are sufficient cause, what else may he do? As stated previously, Chief Judge Quinn indicates that some action is permissible but does not make any specific suggestions.<sup>60</sup> The Committee on Ethics emphasizes the duty to nrpe the client to refrain from improper acts and advances termination of the attorney-client relationship as the only alternative.

It is submitted that in a court-martial, there are only two actions other than withdrawal which associate counsel may take. He may make a statement, out of the presence of the court, to the effect that he desires the record to reflect that for certain personal reasons which he will not disclose, he does not wish to be associated with the conduct of the defense any further; or he may merely remain silent and refrain from any further participation in the trial. If individual counsel continues to conduct the defense, a statement of dissociation, made out of the court's presence, should not result in any substantial prejudice. In such a situation, mere silent non-participation will probably pass unnoticed.

Thus far, the discussion in this section has been limited to a consideration of the actions which may be taken by counsel who desires to justify his request to withdraw, to dissociate himself from the further conduct of the defense, or to protect his own reputation from being tarnished by the improprieties of co-counsel. The desire of a counsel to justify withdrawal or to protect his own reputation is understandable, but additional considerations imposed by the Canons of Ethics, statutes, and regulations must also be taken into account.

Canon 29 imposes on an attorney the obligation to expose perjury or corrupt or dishonest conduct in the profession. Canon 37 states that a counsel may disclose his client's announced intention to commit a crime. At first glance, these requirements seem simple and easy to apply, yet in the profession of the law there is a serious division of opinion as to how they should be applied in practice. Probably all lawyers would agree that perjury, or corruption and dishonesty in the profession *should* be exposed, yet when lawyers are

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<sup>60</sup> United States v. Winchester. 12 USCMA 74, 30 CJIR 74 (1961).



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asked whether they would report a particular act of perjury by a client, or a particular act of dishonesty by a fellow attorney, the division of opinion appears. Opinions from attorneys engaged in criminal practice differ from those of attorneys in civil practice; prosecutors' opinions differ from those of defense counsel. Opinions differ on the basis of whether the perjury or dishonesty occurred in a civil or criminal case, and on whether it was committed by an opponent, an associate, an opposing client or witness, or one's own client or witness. Strangely enough, the Canons do not indicate that any such distinctions should be considered.

In addition to differences of opinion based on these varied distinctions, there is a split of opinion on the proper interpretation of Canon 37. Even the American Bar Association Committee on Ethics is divided,<sup>61</sup> as are various speakers and writers on the subject.<sup>62</sup> Authors who consider the question from an abstract viewpoint (and prosecutors) tend to limit the applicability of Canon 37,<sup>63</sup> while attorneys who are primarily defense counsel are inclined to regard as privileged all information obtained by counsel, from whatever source, during the preparation and trial of a case.<sup>64</sup>

### B. THE DUTY TO REPORT OFFENSES

The problems facing a military counsel who knows that his associate or his accused has committed some corrupt practice, or perjury, or subornation of perjury, is further complicated by certain service regulations which purportedly require the reporting of all observed offenses committed by other service personnel and all known felonies under Federal law committed by any person.<sup>65</sup> Since perjury and subornation of perjury are offenses under the UCMJ,<sup>66</sup> punishable by dishonorable discharge and five years confinement, and felonies under the United States Code,<sup>67</sup> punishable by a \$2,000 fine and five years confinement, the regulations require reporting of such offenses. Even if the regulation did not exist, a military counsel who did not report such offenses might be subject to prosecution, since misprision of a felony is a violation of the Code.<sup>68</sup>

<sup>61</sup> Opinion No. 287, *supra* note 47.

<sup>62</sup> See, e.g., Curtis, *Ethics of Advocacy*, 1 STAN. L. REV. 3 (1951), and Drinker, *Rome Remarks on Mr. Curtis*, 4 STAN. L. REV. 349 (1952).

<sup>63</sup> See, e.g., Drinker, *LEGAL ETHICS* 137 (1953).

<sup>64</sup> See, e.g., Murphy, *The Army Defense Counsel: Unusual Ethics for an Unusual Advocate*, 61 COLUM. L. REV. 233 (1961).

<sup>65</sup> Navy Regs. arts. 1216, 1217 (Aug. 9, 1948).

<sup>66</sup> UCMJ, arts. 131, 134.

<sup>67</sup> MCM, 1951, para. 127c, § A.

<sup>68</sup> 18 U.S.C. §§ 1621, 1622 (1958).

<sup>69</sup> UCMJ, art. 134; MCM, 1951, para. 127c § A, and app. 6c at 192. *But see* MCM, 1951, para. 213d (6), which discusses this offense and which requires more than mere inaction.

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Even though statutes and regulations impose an obligation on military counsel to report offenses, and assuming that Canon 37 and the attorney-client privilege do not operate to prohibit such reports (unless perhaps based on clearly privileged communications from an accused), it is obvious that not every suspicion need be reported. The language of the Manual and the regulation refers to "having knowledge"<sup>70</sup> and "offenses . . . which may come under . . . observation."<sup>71</sup> It is also clear that there are many acts which may violate the Canons and yet not amount to offenses, much less felonies.

Thus, we have seen that a counsel *may* be under an ethical duty to report misconduct, and *is* under a legal duty to report certain offenses. Whether counsel *should* and *will* report such incidents becomes a matter for the counsel's conscience. In spite of the provisions of the Canons, regulations and statutes, most counsel would be reluctant to report any but the most serious misconduct and offenses by an accused.

If counsel should decide that a report of misconduct is in order, to whom should it be made, and when should it be made? If counsel has the necessary knowledge during trial, the report should be made at that time to the law officer, for such action as he may consider appropriate: after trial such report should be made to the convening authority. Under the authority of the *Manual*,<sup>72</sup> the Judge Advocates General have prescribed certain detailed procedures<sup>73</sup> for handling cases of misconduct of civilian or military counsel by the law officer (by means of an admonition and contempt procedure), the convening authority (by convening a board of two or more officers to investigate the offense, and recommend appropriate disciplinary action, in the case of military counsel), and the Judge Advocate General (by initiating action to suspend the offender from acting as counsel before courts-martial). In view of the provisions of Canon 29, it would seem proper that the Judge Advocate General should, in addition to suspending counsel's right to practice before courts-martial, transmit a report of the circumstances to the Department of Justice for possible prosecution or to the appropriate Bar Association Grievance Committee for possible disbarment, when the circumstances indicate dishonorable or corrupt conduct by the attorney.

While no specific procedures have been established for cases involving misconduct of persons other than counsel, the general procedures for reporting and processing of offenses by military personnel are

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<sup>70</sup> MCM, 1961, app. 6c at 492.

<sup>71</sup> Navy Regs., *supra* note 65.

<sup>72</sup> MCM, 1951, para. 43.

<sup>73</sup> Navy JAG Manual § 0135 (Nov. 1, 1961) : Special (Army) Regs. No. 22-130-5 (March 26, 1951).

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well established in all services, and if the offense has been committed by a civilian, it should be a simple matter to transmit the necessary information to the United States Attorney or the local prosecutor as appropriate.<sup>74</sup>

### V. SUMMARY AND CONCLUSIONS

An accused facing trial by court-martial is entitled as a matter of right to the services of military counsel in addition to the services of such other counsel as he may have retained. The military counsel has an obligation to advise the accused of his various rights, including the right to retain individual civilian counsel. If the accused desires to retain individual counsel, appointed counsel should assist him in selecting and contacting a civilian attorney, regulations to the contrary notwithstanding, so long as the final choice of counsel is left to the accused.

If the accused retains individual counsel, both he and counsel should confer at the earliest possible time in order to arrive at an understanding on the status of the appointed counsel. There should be a clear understanding between counsel concerning the division of responsibility between themselves, so that efficiency may be assured and duplication avoided. The manner of division is not as important as the fact that the necessity of planning a division requires both counsel to examine and discuss various factors. The fact that civilian counsel may be receiving a fee while military counsel does not is immaterial. Military counsel is paid by the government and is assigned by the government as counsel—and in any event he is working for the accused, not for co-counsel.

Conflicts between co-counsel are inevitable: fortunately, most are settled amicably. An accused who has retained individual counsel and requested appointed counsel's services as an associate wants both to work in harmony. Both counsel owe him the obligation of their best efforts to resolve conflicts, for unseemly wrangling may hamstring the defense and prevent accused from receiving the fair trial to which he is entitled.

When conflicts cannot be resolved by counsel, the accused must be allowed to decide the issue. However, neither co-counsel nor the accused can require a counsel to compromise or abandon his ethics. When there is an ethical basis for the conflict, the problem should be pointed out to co-counsel and the accused. If either persists in a

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<sup>74</sup> The Federal statutes concerning perjury and subornation, *supra* note 68, clearly apply to such offenses committed before courts-martial. Depending upon the particular state statutes involved, prosecution by local authorities for offenses such as assault (on a witness or party), intimidation of witnesses, etc., may be possible.

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course of conduct ethically repugnant to counsel, the latter should ask to be excused from further participation in the case. The appointed counsel can also withdraw from the case by requesting the convening authority to relieve him. Finally, counsel may request that the law officer relieve him, giving such reasons as may properly be disclosed.

Although the Code requires that appointed counsel serve as an associate at accused's request, Congress did not intend to require appointed counsel to serve when participation would require dishonesty or corruption by that counsel. Furthermore, the convening authority cannot have had a similar intent when he ordered the officer to serve as appointed counsel, for his order would be unlawful to the extent that it required dishonesty or corruption in compliance. Accordingly, the law officer has the power to relieve appointed counsel over accused's objection, for good cause, at least when relief of the appointed counsel will not leave the accused without representation.

In the event that withdrawal is not proper, or if requested, is denied, counsel may take action to dissociate himself from the case by making a statement for the record, out of the court's presence, to that effect. Counsel must be careful not to disclose privileged matter in such statement, but must bear in mind that a statement of an announced intent to commit an offense in the course of the trial is not privileged. If a statement of the specific reasons for desiring to be relieved or dissociated would disclose privileged matter, counsel may still state that he desires to be relieved, or to be considered as dissociated, for reasons he cannot disclose.

In cases of corruption or dishonesty of co-counsel or criminal conduct by an accused, counsel is under an ethical obligation (and in certain circumstances a legal obligation) to report the misconduct to the law officer, the convening authority, or other appropriate authority for disciplinary action.

In any of the events discussed above, counsel should not lightly resort to withdrawal, dissociation, or reporting. He should do his utmost to dissuade co-counsel or the accused from the misconduct, using his best efforts to reserve the dignity and honor of the profession of law *and* the accused's right to a full and fair defense. He should request withdrawal, record his dissociation, or report misconduct only as a last resort to preserve not his reputation but his honor and the honor of the profession.

# COMMUTATION OF MILITARY SENTENCES\*

BY LIEUTENANT COLONEL MILTON G. GERSHENSON\*\*

## I. INTRODUCTION

### A. GENERAL—REVIEW OF CRIMINAL CONVICTIONS

In federal civilian cases, review of the verdict and sentence is confined to the judicial branch, via the processes of direct appeal and of collateral attack. However, the Chief Executive possesses constitutional power to grant reprieves and pardons for offenses against the United States.<sup>1</sup>

In military justice, the authority who convened the court-martial<sup>2</sup> is required to "put on a second hat"<sup>3</sup> and review the findings and sentences of each of his courts-martial. If the sentence, as approved, extends to an enumerated serious punishment, the record gets, as outlined below, at least a second review by a Board of Review.<sup>4</sup> The Uniform Code of Military Justice uses, in part, common language as

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\* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> U.S. Const., art II, § 2.

<sup>2</sup> The immediate or a superior commanding officer, depending on factors currently set forth in Arts. 22-24 of the UNIFORM CODE OF MILITARY JUSTICE, Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Re-enacted in 1956 as 10 U.S.C. §§ 801-940 (1958) (hereinafter cited as UCMJ, art. —).

<sup>3</sup> Although criticized by many, this function has been exercised historically since the time when commanders ceased to sit as president of a court-martial. See historical survey, citations, and discussions in U.S. DEPT OF ARMY PAMPHLET 27-175-1, MILITARY JUSTICE: REVIEW OF COURTS-MARTIAL, PART I, INITIAL REVIEW, 1962, 57-58 (hereinafter cited as DA PAM. 27-175-1, INITIAL REVIEW).

<sup>4</sup> Court-martial review processes may be summarized as follows: After a trial by court-martial, the record is forwarded to the convening authority for initial review (UCMJ, art. 60). Before taking action on a general court-martial case, the convening authority is required to refer the record to his staff judge advocate for his written opinions and recommendations (UCMJ, art. 61). Thereafter, records of general courts-martial (and those special courts-martial in which a bad-conduct discharge was approved) are forwarded to The Judge Advocate General of the armed force. A Board of Review in his office of not less than three judge-officers or civilians, reviews the record in every case in which the sentence, as approved, extends to death, dismissal of an officer, cadet or midshipman, dishonorable or bad-conduct discharge, confinement for one year or more, or affects a general or flag officer (UCMJ, art. 66). Three types of cases are thereafter reviewed by the Court of Military Appeals, a court of three judges appointed from civilian life, holding office, in general,

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to both these authorities, providing that in so acting he and it shall approve and affirm, "only such findings of guilt, and the sentence or such part or amount of the sentence," as he and it "finds correct in law and fact." <sup>5</sup>

Let us consider each of these factors: With respect to the findings, the convening authority and Board of Review must be satisfied that they were established beyond a reasonable doubt by the competent evidence of record.<sup>6</sup> With respect to the sentence, there must be considered, in review, three factors—legality, appropriateness, and then, discretion.<sup>4</sup> The latter two of these may lead to an amelioration of sentence not required or occasioned by legal error. Such amelioration may take, in turn, the form of suspension, mitigation or commutation of sentence.<sup>8</sup> Suspension concerns only the withholding of the execution of the sentence, and will not be further considered herein.<sup>9</sup>

Mitigation describes a reduction in the quantity or the quality of a sentence, where the general nature of the punishment remains the same. It is the substitution of a sentence lesser <sup>10</sup> than and included in the sentence adjudged by the court, *i.e.*, *ejusdem generis* with the original.<sup>11</sup>

Commutation is a change in the nature of the punishment by the substitution of a lesser punishment of a different nature. It is particularly appropriate for those punishments not reducible in kind. The classic illustration of commutation is the reduction of a sentence of death to that of life imprisonment. By its very nature, the former is not susceptible of mitigation, as herein defined.<sup>12</sup>

Two basic points should be noted, common to mitigation and to commutation: The changed sentence must be one which could legally

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for overlapping terms of 15 years. They are: (1) death sentences, and sentences affecting a general or flag officer, (2) cases certified by The Judge Advocate General, and (3) cases in which, upon petition of the accused and on good cause shown, the court has granted a review (UCMJ, art. 67). Finally, sentences of death, or those involving a general or flag officer, shall not be executed until approved by the President (UCMJ, art. 71 (a))

<sup>5</sup> UCMJ, arts. 64 and 66(c).

<sup>6</sup> U.S. DEPT OF DEFENSE, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, paras. 87a and 100 (hereinafter cited as MCM or MCM, 1951, para. —)

<sup>7</sup> DA PAM. 27-175-1, INITIAL REVIEW, 116.

<sup>8</sup> See discussion of these concepts, generally, in Bednar, *Discharge and dismissal as Punishment in the Armed Forces*, 17 MIL L REV. 17-21 (1962) (hereinafter cited as "Bednar"); DA PAM. 27-175-1, INITIAL REVIEW, 116-146; WINTHROP, MILITARY LAW AND PRECEDENTS, 466-475 (2d ed. 1920) (hereinafter cited as WINTHROP.)

<sup>9</sup> See, generally, DA PAM. 27-175-1, INITIAL REVIEW, 142-146

<sup>10</sup> Quantitative reduction is termed remission. DA PAM. 27-175-1, INITIAL REVIEW, 138.

<sup>11</sup> WINTHROP, 471; MCM, para. 88c.

<sup>12</sup> MCM, para. 88c; DA PAM. 27-175-1, INITIAL REVIEW, 138-142; WINTHROP, 471; Bednar, 22.

be adjudged by the court, and must be a lesser punishment.<sup>13</sup> It is with commutation of sentences, as so defined in military law, that this article deals.

## B. PARDON, MITIGATION AND COMMUTATION IN THE SUPREME COURT

A curious chapter in federal law pertaining to the commuted versus the mitigated sentence started with the landmark pardon case of *U.S. v. Wilson*.<sup>14</sup> Wilson had committed a number of mail robberies resulting in several federal indictments. His trial under one of them resulted in his sentence to death. President Jackson pardoned Wilson, but expressly stipulated in the document that it did not apply to any of his other crimes. When trial came up under one of the other indictments, his original plea of not guilty was withdrawn and a plea of guilty substituted. Concerned over the possible impact of the pardon, the judges asked whether he sought to avail himself of the pardon. His reply was that he had "nothing to say" but that he did not wish to avail himself of it. Because of their continued uncertainty, the judges certified the question to the Supreme Court under the practice at that time. In the argument in that court, the prosecution took the position that a pardon must be accepted and must be pleaded in bar of any subsequent attempt to prosecute the offender. Turning to English precedents, Chief Justice Marshall agreed with the prosecution, and announced that a pardon, which is an act of grace exempting the donee from punishment for a crime which he has committed, is a "deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."<sup>15</sup> Marshall further argued that a man of principle faced with an unjust accusation might prefer the

<sup>13</sup> MCM, para. 88c; UCMJ, art. 64. Casual statements, taking one of two slightly different forms, commonly are found: (1) Commutation must mitigate the original punishment; (2) Commutation must not increase the original punishment. For example, see text accompanying note 22, *infra*; *U.S. v. Rigger*, 2 USCMA 297, 305, 8 CMR 97, 105 (1953). The second statement is more accurately descriptive of the authority of the court-martial on rehearings. See note 82, *infra*. However, see Judge Latimer's definition of "the best workable rule" for commutation in *U.S. v. Christensen*, 12 USCMA 393, 395, 30 CMR 393, 395 (1961), picked up in the 1961 Surrey of Military Justice, 16 MIL. L. REV. 127 (1962), and compare Judge Ferguson's language in *U.S. v. Johnson*, 12 USMCA 640, 643, 31 CMR 226, 229 (1962). The use of general language in CCMJ, arts. 64 and 66(c) rather than the use of the older terms "mitigation" and "commutation" plus the current interpretation of the scope of review under these articles would still indicate that mitigative action is required.

<sup>14</sup> 32 U.S. (7 Pet.) 150 (1833).

<sup>15</sup> *Id.* at 161.

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unjust conviction to a pardon—which itself would connote his acquiescence in his moral guilt. In this sense, to such person, pardon would imply greater disgrace than conviction. The opinion in the *Wilson* case, although the actual holding is that a failure to plead a pardon in bar removes the force of that pardon from the case, has become the generating source of general statements to the effect that a pardon is a deed to the validity of which both delivery and acceptance are required.<sup>16</sup>

Some twenty years later, the Supreme Court ruled definitively on the commuted sentence.” One Wells was convicted of murder in the courts of the District of Columbia and sentenced to death. Pres. Fillmore signed a document stating: “I . . . do hereby grant . . . a pardon of the offense of which he was convicted, upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life . . .” On the same day, Wells, in jail, signed this statement: “Thereby accept the above and within pardon, with condition annexed.”

Wells thereafter sought habeas corpus, arguing that while the pardon was valid, the condition was void and his consent thereto nugatory. His contentions were rejected by the court. again on an examination of English precedents and practices in the field of pardons. A conditional pardon, well recognized in England, is within the constitutional pardon power of the President. The fallacy in Wells’ argument was that the attaching of the condition is not the exercise of a new power, but only an incident of the pardon power. Finally, continuing the acceptance theory, the signing in jail of his consent to undergo the substituted punishment was not thereby tainted with duress.

Note that we have encountered the classic illustration of commutation in the change of a death sentence to a life sentence; that the pardon document used the terms “pardon upon condition” and “commuted” as equivalents; and that a fair inference from the holding is that acceptance of a commuted sentence at this time is a legal prerequisite to the power, even of the President, to commute a sentence.

Sixty years later, in *Burdick v. U.S.*, the acceptance theory was continued, but in a different setting.<sup>18</sup> A federal grand jury seeking

<sup>16</sup> Two theories have run through the law of pardons. The earlier is to the effect that a pardon blots out the guilt and makes the person “as it were, a new man, and gives him a new capacity and credit.” WINTHROP, 467. The more modern theory is that the donee remains a convicted criminal and that the pardon, to the extent of its terms, forgives only the penalty. and that a pardon implies guilt. See 67 C.J.S. *Pardons* § 11 (1950); 39 Am. Jur. *Pardon, Reprieve and Amnesty* § 52 (1942) and cases cited. U.S. v. Wilson, 32 U.S. (7 Pet.) 150 (1833), is premised on the latter theory.

<sup>17</sup> *Ex parte Wells*, 59 U.S. (18 How.) 421 (1856).

<sup>18</sup> 243 U.S. 79 (1915).



to interrogate Rurdick was blocked by his invocation of his constitutional privilege against self-incrimination. A presidential pardon was thereupon procured. Burdick refused to accept it, and continued to invoke his privilege. The attempt to punish him for contempt failed; once again, the acceptance theory was repeated, including the notion that pardon may carry a connotation of original guilt, and the Supreme Court sustained his right to refuse the pardon.

The acceptance theory may have come to an end, however, in *Biddle v. Perovich*,<sup>19</sup> in which the Supreme Court sustained the commutation to life imprisonment by President Taft of a death sentence which followed the defendant's conviction for murder in a territorial court. The defendant made the following syllogism: Since commutation was regarded as a form of conditional pardon, in the *Wells* case commutation was held to be included within the power to pardon unconditionally. It is a pardon from the rigors of the punishment actually imposed, but on condition subsequent that the defendant receive and undergo a less severe punishment of a different nature.<sup>20</sup> It then follows that if the acceptance theory is part of the law of pardons, it is equally part of the law of commutation, and was so subsumed in the *Wells* opinion. Therefore, the defendant! not having consented to the commutation, is not bound by it, and is entitled to his release for the pardon has thereby become unconditional. Holmes, J., writing for a unanimous court, abandoned the acceptance theory because of its complete unrealism, saying, in part:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed (citations omitted). Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done . . . Supposing that Perovich did not accept the change, he could not have got himself hanged against the Executive order . . . The only question is whether the substitute punishment was authorized by law . . . By common understanding imprisonment for life is a less penalty than death."

<sup>19</sup> 274 U.S. 480 (1927).

<sup>20</sup> *Ex parte Wells*, 59 U.S. (18How.) 421 (1856); WINTHROP, 471; BENET, MILITARY COURTS & COURTS-MARTIAL 154 (1863); IVES, MILITARY LAW 197 (1879). When so regarded, it is a special case, for the ordinary conditional pardon may impose conditions which the court could not have imposed under its sentencing powers, such as the condition that the prisoner be deported from the United States and not return thereto, so long as they are not illegal, immoral, or impossible of performance. *Kavalin v. White*, 44 F. 2d 49 (10th Cir. 1930).

<sup>21</sup> 59 U.S. (18How.) at 486. The Supreme Court recognized that the acceptance theory is justified in the special case where the pardon is offered to one who has invoked his constitutional privilege against self-incrimination. In this area,

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Since the instant case deals with commutation in its true sense, whether the same approach would be taken with reference to an unconditional pardon has yet to be squarely ruled upon. Corwin takes the position that whether the words quoted above "sound the death knell of the acceptance doctrine is perhaps doubtful" in the case of an unconditional pardon. He goes on to point out, however, that by substituting "a commutation order for a deed of pardon, a President can always have his way in such matters, provided the substituted penalty is authorized by law and does not in common understanding exceed the original penalty."<sup>22</sup>

Pausing for a moment at this point, it may profitably be noted that from this case forward, commutation and mitigation, although technically separate military law concepts, now run together in general federal law; for once any necessity for acceptance of a commuted sentence is removed, the sole justiciable issue in either situation is whether the substituted punishment is remissory. In civilian criminal law, the categories of punishment are so limited—death, imprisonment and fine comprise the whole list—that the requirement that the truly commuted punishment be remissory should not develop problems of any complexity. Long since laid to rest has been the classic question whether life imprisonment is a less severe punishment than a death sentence. A spate of opinions, more or less philosophical, all answering the question in the affirmative, have been produced.<sup>23</sup> Perhaps the commutation of a short term of imprisonment to a heavy fine may present the question; no reported cases in point have been found.<sup>24</sup> But with the greater number of possible punishments open to a court-martial, the requirement of remission will not be so simple.

This blurring of commutation and mitigation in federal civilian trials had already been presaged in the 1909 decision in *Mullan v. U.S.*<sup>25</sup> The case is of particular interest for it was a collateral attack in the U.S. Court of Claims on a sentence of a naval court-martial. Commander Mullan had been sentenced by the court-martial to be dismissed from the Navy. The Secretary of the Navy approved the sentence. Thereafter, the President made the following order: "The

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the constitutional right of the President must be balanced against the constitutional right of the recalcitrant witness. *Burdick v. U.S.*, 236 U.S. 79 (1915).

<sup>22</sup> CORWIN, *THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION* 407 (1953).

<sup>23</sup> *Biddle v. Perovich*, 274 U.S. 480 (1927), disposed of this argument in a single sentence, quoted in the text of this article. Other representative opinions include: *Peo. ex. rel. Patrick v. Frost*, 133 App. Div. 179, 117 N.Y. Supp. 524 (1909); *Ex parte Denton*, 69 Okla. Cr. 204, 101 P. 2d 276 (1940).

<sup>24</sup> *Cf.* a pardon of a term of imprisonment conditioned on reimbursement of the trial expenses of the state, *Peo. v. Marsh*, 125 Mich. 410, 84 N.W. 472, 51 L.R.A. 461 (1900), or on the payment of a fine. *Moore v. Lawrence*, 192 Ga. 441, 15 S.E. 2d 519 (1941).

<sup>25</sup> 212 U.S. 516 (1909).

sentence in the foregoing case . . . is confirmed, but is mitigated<sup>26</sup> as follows: To be reduced in rank, so that his name shall be placed at the foot of the list of commanders in the Navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list." After expiration of the period of the "mitigated" sentence (which was later remitted to four years) suit was brought in the Court of Claims to recover the difference in his pay for the period of diminution. Two contentions were made: first, that the court-martial proceedings were void (for reasons not pertinent here), and second, that the President's order was illegal and a nullity since his action was subject to the then provisions of the Articles for the Government of the Navy:<sup>27</sup> "Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such conduct which he is authorized to approve and confirm." The Supreme Court sustained the Court of Claims in rejecting both contentions; it acknowledged the "technical" difference between mitigation and commutation,<sup>28</sup> but did not seem particularly impressed with the difference. This may be surmised in part from its sole citation, as authority, of a law dictionary definition.<sup>29</sup> Further, while the Court accepted the holding of the Court of Claims that the above-quoted Article did not apply to the action of the President,<sup>30</sup> it went on, even assuming the Article to apply, to hold that his action was legal. The opinion as

<sup>26</sup> Note the variant language employed in Presidential action: (a) *Ex parte* Wells, 59 U.S. (18 How.) 421 (1856): Pardoned "on condition" that life imprisonment follow; "that is, the sentence of death is hereby commuted to imprisonment for life."

(b) *Perovich v. U.S.*, 274 U.S. 480 (1927): Death sentence "commuted" to imprisonment for life; no conditional pardon language at all.

(c) *Mullan v. U.S.*, *supra* note 25: Sentence of dismissal from the service "mitigated" to loss of numbers, reduction and suspension in rank, and forfeiture of pay.

<sup>27</sup> REV. STAT. § 1624, art. 54 (1875).

<sup>28</sup> 212 U.S. at 519: "It may be conceded that there is a technical difference between commutation of a sentence and the mitigation thereof. The first is a change of punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. To mitigate a sentence is to reduce or lessen the amount of the penalty or punishment."

<sup>29</sup> 1 BOUVIER, LAW DICTIONARY 374 (3d rev. ed. 1914): 21*d.* 428.

"While WINTHROP, 466, closely distinguishes the action of the President as such from his action as a reviewing officer of a court-martial, the court did not comment on the capacity in which the President did act in the instant case; it would seem clear that he did not act as a reviewing officer. If this is so, he had unequivocal power to commute by virtue of the pardoning power. *Ex parte* Wells, 59 U.S. (18 How.) 421 (1856). At least since *Perovich*, acceptance by the donee is not required.

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a whole, while engendering divided opinions as to its meaning,<sup>31</sup> breathes an air of impatience with the invocation of a technical defense. reiterating that the lessening of a severe penalty did reduce, mitigate and diminish it in favor of the accused. It does not, however, clarify why the President's action should not, more precisely, have been regarded as action by way of commutation.

### 11. COMMUTATION IN AMERICAN MILITARY LAW PRIOR TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950

An examination of the Articles which have governed the Armies of the United States from 1775 until the enactment in 1950 of the Uniform Code of Military Justice reveals that a distinct pattern of allocation was adhered to with consistency.

Power to mitigate and remit was expressly and consistently given to commanders acting as reviewing authorities.<sup>32</sup>

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"The judges of the Court of Military Appeals have differed on the proper interpretation of the holding, the principal disagreement being as to whether the action did constitute commutation. In *U.S. v. Goodwin*, 5 USCMA 647, 18 CMR 271 (1955), Judges Latimer and Brosman seem to regard *Mullan* more as a commutation than a mitigation case, but since the President can do either, feel that it is not really important to draw the line: Chief Judge Quinn, in his dissent, seems committed to the position that only mitigation is involved. Both opinions divide on whether the *Mullan* holding is controlling as to cases arising under the UCMJ concerning the lawfulness of action by a Board of Review.

Since acceptance by the defendant is no longer required after *Perovich*, the presence or absence of acceptance will not help to distinguish a commutation case from a mitigation case, where acceptance was never a requirement. Further, although it seems that some states continue to consider pardon to be subject to acceptance (*Ex parte* Strauss, 320 Mo. 349, 7 S.W. 2d 1000 (1928); *Ex parte* Denton, 69 Ore. Cr. 204, 101 P. 2d 276 (1940); Application of Fredericks, 211 Ore. 312, 315 P. 2d 1010 (1957); *Ex parte* Crane, 115 Tex. Cr. 168, 29 S.W. 2d 357 (1930)), *U.S. v. Johnson*, 12 USCMA 640, 31 CMR 228 (1962) dismissed the wishes of the accused as irrelevant to the issue of the validity of action of the convening authority in changing a term of years to a punitive discharge.

<sup>32</sup> Art. LXVII, Articles of War 1776; Sec. XVIII, Art. 2, Articles of War 1776; Art. 89, Articles of War 1806; Art. 112, Articles of War 1874; Art. 50, Articles of War 1917; Art. 40, Articles of War 1920; Art. 51, Articles of War, 1948.

Until the 1917 Articles of War, express power to pardon was also conferred on commanders exercising reviewing authority. WINTHROP, 472, took the reasonable position that this conferred only a power of remission, in view of the phrasing, viz., "shall have power to pardon or mitigate," thereby reducing it to mere tautology. He seemed to have been influenced in this position by (a) the British Army Act which expressly empowered the reviewing authority to "remit, mitigate or commute", which he said was "a form of conveying the power much to be preferred to that retained in our statute" (at 471), and (b) the United States Naval Code, which has consistently prohibited command commutation. He concluded his discussion by somewhat questioningly saying: "In practice, however, commutation has not unfrequently been resorted to by military reviewing officers, and there has yet been no authoritative ruling that such action is not legitimate." May it be that commutation by reviewing authorities, until 1917 when power to pardon was removed from their provenance, had been

## COMMUTATION

Power to commute sentences was expressly conferred on the President (in addition to his power to remit or mitigate) in the 1920 Articles of War by Article 50 1/2. Prior Articles of War had required confirmatory action by the President in specified cases but had not particularized his powers other than in general terms of confirmation or disapproval.<sup>33</sup> However, from the discussion in the preceding section of this article, there is no doubt of his power at all times to have done so under his plenary power to pardon.<sup>34</sup>

The same two themes run through the various *Manuals for Courts-Martial*.<sup>35</sup>

Boards of Review, created in 1920, were given power only to pass on the "legal sufficiency" of the findings and sentence in specified heavier punishments adjudged by general courts-martial, and in 1948

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resorted to on the theory that since they had been consistently given express power to pardon, they had power thereby to do more than mitigate, and therefore could commute?

"First reference appeared in Sec. XIV, Art. 8, Articles of War 1776, which required that no sentence of a general court was to "be put in execution, till after a report shall be made of the whole proceedings to Congress, or to the general or commander in chief of the forces of the United States" (*viz.*, the President), and "their or his directions be signified thereupon."

Art. 2 of the Articles of War 1788 required "confirmation or disapproval and their orders on the case" of the Congress in cases in time of peace in which the sentence extends to **loss** of life, dismissal of a commissioned officer, or in time of peace or war with respect to a general officer.

Art. 65 of the Articles of War 1806 again covered these three types of special cases, but now required "confirmation or disapproval, and orders in the case" of the President, before whom the whole proceedings shall be laid by the Secretary of War.

Arts. 105, 106 and 108 of the Articles of War 1874 required "confirmation" by the President of the same three special cases, with minor adjustments.

Art. 60 of the Articles of War 1917 again spoke of no "mitigation or remission" of any sentence of dismissal of an officer or any sentence of death by any authority inferior to the President.

Art. 50 of the Articles of War 1920 expressly authorized commutation by the commanding general of the Army in the field or the commanding general of the territorial department or division, but only if empowered by the President so to do.

Art. 49 of the Articles of War 1948, dealing with "confirming authorities", i.e., the President, the Secretary of the Army or the Judicial Council (the precursor, composed of three JAG general officers, of the Court of Military Appeals under the 1950 UCMJ), included the power to commute in subd. b thereof.

<sup>33</sup> *Ex parte Wells*, 59 U.S. (18 How.) 421 (1856) : WINTHROP, 466; compare 1 Op. Atty. Gen. 327 (1820) with 5 Op. Atty. Gen. 368 (1851).

<sup>35</sup> Judge Latimer, in his historical review of the power to commute contained in his opinion in *U.S. v. Goodwin*, 5 USCMA 647, 18 CJIR 271 (1935), refers to § 8 of the Manuals published in 1895, 1898, 1901, 1905, 1908; § 384 of the 1917 Manual; § 87b of the 1928 Manual was drafted to conform to Art. 50 of the 1920 Articles to cover the designees of the President; finally, § 87b of the 1949 Manual was drafted to conform to the provisions of Art. 49 of the 1948 Articles, and limited commutation to a "confirming authority." See note 33, *supra*.

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were empowered to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.<sup>36</sup>

With reference to the Navy, power to commute has been reserved, in part, to the Secretary of the Navy, and, of course, to the President. As already noted, power to commute was expressly excepted from the powers of the reviewing authority;<sup>37</sup> however, the power of the Secretary of the Navy to commute is not expressed in the Articles but in the *Naval Courts and Boards*.<sup>38</sup>

Reverting to the Army, what was the reason for the long-continued and uniform denial of power to commute to military reviewing officers? A forceful statement appears in the sole dissent in *Ex parte Wells*,<sup>39</sup> written by Mr. Justice McLean:

The power of commutation overrides the law and the judgments of the courts. It substitutes a new, and it may be, an undefined punishment for that which the law prescribes a specific penalty. It is, in fact a suspension of the law, and substituting some other punishment which, to the Executive, may seem to be more reasonable and proper . . .

If the law controlled the exercise of this power, by authorizing solitary confinement for life, as a substitute for the punishment of death, and so of other offenses, the power would be unobjectionable; the line of action would be certain, and abuses would be prevented. But where this power rests in the discretion of the Executive, not only as to its exercise, but as to the degree and kind of punishment substituted, it **does** not seem to be a power fit to be exercised over a people subject only to the laws.

To speak of a contract by a convict, to suffer a punishment not known to the law, nor authorized by it, is a strange language in a government of laws. Where the law sanctions such an arrangement, there can be no objection; but when the obligation to suffer arises only from the force of a contract, it is a singular exercise of executive power.

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<sup>36</sup> Art. 50½, 1920 Articles; Art. 50, 1948 Articles.

<sup>37</sup> Statute cited note 27 *supra*.

<sup>38</sup> U.S. NAVY DEP'T (1937). Art. 54(b) uses the phrase "remit or mitigate, in whole or in part", but § 481 of NAVAL COURTS AND BOARDS states that "the broad power conferred . . . by Art. 54(b), A. G. N., to mitigate the sentence imposed by any naval court-martial includes the power to commute a death sentence to life imprisonment, and dismissal to loss of numbers or suspension from duty on one-half pay." *Aderhold v. Menefee*, 61 F. 2d 345 (5th Cir. 1933), putting art. 54(a) which expressly excepts power to commute from reviewing officers, alongside of art. 54(b), found an intent of Congress to confer power to commute on the Secretary. It is curious that this appellate case sustaining such construction of the intent of Congress deals with "commutation" of a death sentence to one of life imprisonment: we enter the same area of shadows occupied by the *Mullan* and *Perovich* cases in the Supreme Court—are we dealing with other than mitigation? Perhaps in an effort to stay close to the statutory language, the Secretary of the Navy, in this case, ordered the death sentence "mitigated" to imprisonment for life.

<sup>39</sup> 59 U.S. (18 How.) 421 (1856).

While spoken of the action of the President, the criticism is equally applicable to a military reviewing authority.<sup>40</sup> It would appear, therefore, that the long-continued refusal to interpret the powers of a commander as to include power to commute is based on the opposition to inordinate "command influence"—an issue over which bitter controversy has not yet died away, and one which was raised, to some degree, during the congressional hearings which preceded the adoption of the Uniform Code of Military Justice, *infra*. Of course, with reference to the powers of Boards of Review, in existence since the 1920 Articles, converse reasoning would lead to the belief that they might have power to commute so as to negative any improper command influence in the sentence below.

# 111. THE HEARINGS PRIOR TO THE ENACTMENT OF THE UNIFORM CODE OF MILITARY JUSTICE, THE PROVISIONS OF THE CODE, AND THE MANUAL FOR COURTS-MARTIAL, 1951

When we examine the provisions of the Uniform Code of Military Justice concerned with review processes, we find again, as has been true throughout the history of American military law, that power to commute is given to the President; in addition, extending the uniform Navy practice of secretarial commutation, power to commute is given to the Secretary of each Department, or his designees, in specified cases.<sup>41</sup>

Turning to the powers of the convening authority, we now find an alteration of the hitherto-specified power to mitigate and remit. His powers are now more loosely defined. He "shall approve only such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved."<sup>42</sup> Further, the scope of review by Boards of Review is also restated, the earlier yardstick of legal sufficiency being replaced with similarly loosened language: "It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and

<sup>40</sup> Mr. Justice McLean speaks of Attorney General Mason's opinion in 4 Op. Atty. Gen. 444 (1945) to the effect that the War Department has always considered that the President cannot commute an Army sentence: he can only mitigate it. Cf. 5 Op. Atty. Gen. 368 (1951). WINTHROP, 473, cites a letter of Gen. Washington to the effect that mitigation does not by implication include commutation.

"Art. 71 (a) and (b), UCMJ. As already pointed out in note 33, *supra*, power to commute was given to certain designees of the President under the 1920 Articles, and to the Secretary of the Army and the Judicial Council under the 1948 Articles.

<sup>42</sup> Art. 64, UCMJ.

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fact and determines on the basis of the entire record, should be approved.”<sup>43</sup>

Finally, it may be noted that it was contemplated that the only power of the Court of Military Appeals over a sentence would be “to determine whether it is within legal limits.”<sup>44</sup>

To determine the intent of Congress in adopting such new language, the record of the congressional hearings must be examined.<sup>45</sup>

Prof. Edmund M. Morgan, Chairman of the Special Committee created by Secretary of Defense James Forrestal to draft the Uniform Code, testified generally before the House Committee, and made some comments pertaining to appellate review.<sup>46</sup> He pointed to the informality of existing Navy review procedures and to the fact that in the main, “it rests ultimately with the Secretary of the Navy”: that an accommodation was sought to overcome the Navy’s feeling that the 1948 system was “wholly impracticable for its operation”: that the proposed initial review by the convening authority, covering law, facts, credibility of witnesses and a review of the sentence “is in all essentials the same as the first review provided at the present time by both the Army and Navy”; and that the Board of Review, as is true under the 1948 system, would likewise review law, fact, and sentence.

In closing, he indicated that a balance had to be struck to minimize command influence; however, because of the military nature of courts-martial, “we have preserved the initial review of the findings and sentence by the commander”; further, that “we have lessened the command influence by making for all the services the provision which was in the 1948 bill as to the extent of review by the Judge Advocate General’s Office, namely, that they can review for law, fact and sentence, so that they need approve only so much of it as they think entirely justified. And again, in response to Mr. Elston’s question with regard to command influence in review, he said: “The commanding officer can do anything in favor of the accused. He cannot do anything against the accused . . . He can decrease it (the penalty).”

Mr. Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense, who was the executive secretary to the Forrestal Committee and chairman of the working group which made the initial studies, made a section-by-section analysis. He commented that Art.

<sup>43</sup> Art. 66(c), UCMJ.

<sup>44</sup> Art. 69(d), UCMJ: H.R. REP. SO. 491, 81st Cong., 1st Sess. 32 (1949); *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 1271 (1949); *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess., 312 (1949). Appropriateness of sentence, as a matter of law, is within the competence of the court. *U.S. v. Christopher*, 13 USC1A 231 (1962).

<sup>45</sup> References are made to the paging of the INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE (1950).

<sup>46</sup> *House Hearings* 604-616.



64 “substantially conforms to present practice in all of the armed forces.” He also pointed out that the convening authority can only cut down the sentence, and cannot increase it. The Committee expressed concern whether the draft language was clear enough to assure that the convening authority had authority to remit a sentence without any legal reason; as an illustration, they pondered whether a military commander could “empty the guardhouse” by suspension so as to release combat soldiers to meet urgent military necessities with the hope of earning remission. At their insistence, Article 64 was amended by inserting the phrase “as he in his discretion” determines should be approved.<sup>47</sup> It was again reiterated that the convening authority “had the right to remit any part of the sentence he wanted to; that is, to do anything he desired with the sentence, so far as abating it was concerned.”<sup>48</sup>

There was no discussion pertinent to this article as to the scope of review by the Boards of Review other than a general comment in the House Report that “the board may set aside, on the basis of the record, any part of the sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces.”<sup>49</sup>

The House Report on the completed bill, again referring to command control, states: “Under existing law commanding officers retain full power to set aside findings of guilty and modify or change the sentence, but are not permitted . . . to increase the severity of any sentence imposed. We have preserved these elements of command in this bill.”<sup>50</sup> And in the section analysis, it is restated: “He may disapprove a finding or a sentence for any reason.”<sup>51</sup>

When we examine the Senate Hearings, we find Prof. Morgan making the same general statements concerning the convening authority’s power over sentences.<sup>52</sup> He again said: “The convening authority may take any action which favors the accused. He cannot take action which would increase the penalty or require a reconsideration of a matter which would be against the interest of the accused. He has full clemency power, so that he can do what the Army usually calls ‘bus’ the case, if he wants to at that particular stage.”<sup>53</sup>

The proposed powers of the Board of Review came under closer scrutiny. General Green, the Judge Advocate General of the Army,

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<sup>47</sup> *House Hearings* 1182-1185.

<sup>48</sup> *House Hearings* 1268.

<sup>49</sup> *House Hearings* 1187.

<sup>50</sup> *HOUSE REPORT* 7.

<sup>51</sup> *HOUSE REPORT* 31.

<sup>52</sup> *Senate Hearings* 36.

<sup>53</sup> *Senate Hearings* 41.

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asserted in essence that clemency-type and commutation-type action ought not be given to the Boards, but should be confined to confirming authorities, such as the President and the Secretaries.<sup>54</sup> He made no comment concerning the review powers of the convening authority. Rear Admiral Russell, the Judge Advocate of the Navy, expressed similar misgivings, again differentiating clemency-type action from review for legal sufficiency.<sup>55</sup> However, the Committee indicated its desire that the Board of Review have power to reduce sentences, and did not alter Article 66.<sup>56</sup>

The Senate Report, in its section analysis, adopted verbatim the House Report analysis of the scope of Article 64.<sup>57</sup> With reference to Article 66, despite the adverse comments of the two Judge Advocates General, the Committee retained the liberal scope of review of the Board of Review found in the initial draft.<sup>58</sup> In the section analysis, the Report again adopted verbatim the House Report analysis of Article 66.<sup>59</sup>

One final comment on the proceedings: Secretary Forrestal, in his letter of transmittal of the draft bill, commented briefly, in listing elements of command retained therein, that "commanding officers retain full power to set aside findings of guilty and to modify or change the sentence, but are not permitted to interfere with verdicts of not guilty nor to increase the severity of the sentence imposed."<sup>60</sup>

What can be gleaned as to the intent of Congress from these passages? Only a few hypotheses may be advanced :

1. At no point was there any incisive consideration of the commutation problem.

2. A broader scope of action was intended to be given to the convening authority than to the Board of Review (*vide*, inclusion of the phrase "in his discretion" as to the former) to require no reason for sentence action favorable to the accused.

3. If any scraps of language pertinent to commutative power are found in the proceedings, they were probably not meaningfully uttered.

4. Two service legal chiefs were concerned over "clemency-type" action being available to the Board of Review. The refusal of Congress to go along with their recommendations is not meaningful enough to shed much light on the commutation problem.

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<sup>54</sup> *Senate Hearings* 258, 259, 262.

<sup>55</sup> *Senate Hearings* 280, 285.

<sup>56</sup> *Senate Hearings* 311.

<sup>57</sup> S. REP. NO. 486, 81st Con., 1st Sess. 27 (1949) ; HOUSE REPORT 31.

<sup>58</sup> *Senate Hearings* 311.

<sup>59</sup> SENATE REPORT 28. Commented on by Quinn, J., in his dissent in *U.S. v. Goodwin*, 6 USCMA 647, 660, 18 CMR 271, 284 (1955).

<sup>60</sup> SENATE REPORT 38.

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5. Command influence was very much in the minds of the Committees and the witnesses, and the convening authority's powers were closely examined from this point of view; Boards of Review were deemed to be far removed from such influence.

6. The field was ripe for original adjudication of the commutation problem by the Court of Military Appeals.

The drafters of the *1951 Manual for Courts-Martial* took the traditional position that the convening authority, unless he is the Secretary or the President, has no power to commute a sentence.<sup>61</sup> Accordingly, the *Manual* is drafted *so as* to give a variety of illustrative suggestions in the nature of mitigation, carefully ruling out power to commute.<sup>62</sup> Although not incorporated into the *Manual*, it *was* suggested with respect to non-divisible sentences deemed too severe, that the remedy of the convening authority is to return the record for revision proceedings, or to recommend commutation by a proper higher authority; further, if he determines that the legally-sustained findings of guilty will not sustain a non-divisible sentence, but would support a less severe sentence, he should return the record to the court with directions to reconsider the sentence in the light of the legally-sustainable findings.

Thus, if the court adjudged the death penalty and the convening authority determined that the findings of guilty upon which the sentence was based cannot be sustained, but that a finding of guilty of a lesser included offense can be sustained, he should return the record of trial to the court with the direction that it reconsider the sentence and adjudge an appropriate sentence based on the legally sustained findings of guilty."

No position was taken with regard to the Board of Review's power to commute, Article 66 being substantially reprinted in the *Manual*. As already noted, the Board of Review has powers over a sentence worded almost identically with those given to the convening authority.<sup>64</sup>

### IV. COMMUTATION IN THE COURT OF MILITARY APPEALS

Since the creation of the Court of Military Appeals, a total of five judges has been seated on that bench. Chief Judge Quinn, and Judges Brosman and Latimer constituted the original bench. In April, 1956, Judge Ferguson replaced Judge Brosman after the latter's untimely

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<sup>61</sup> U.S. DEP'T OF DEFENSE, *LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, 126.

<sup>62</sup> *MCM, 1951*, paras. 88c, 105a.

<sup>63</sup> U.S. DEP'T OF DEFENSE, *LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, 125.

<sup>64</sup> Compare art. 64 with art. 66(c), UCMJ.

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death in December, 1955. Judge Kilday replaced Judge Latimer on the expiration of his term of appointment on May 1, 1961.

Each of three latter judges, as soon as he evolved his own judicial philosophy of the commutation power, joined one of the two original protagonists, Judges Latimer or Quinn, who had earlier divided on the issue. The replacement of Judge Brosman, who had joined with Judge Latimer, by Judge Ferguson resulted in a decisional shift on and after April, 1960, by which the newly-formed pro-commutation majority of Judges Ferguson and Quinn replaced the former contra-commutation majority of Judges Latimer and Brosman. Judge Kilday, who replaced Judge Latimer in 1961, has joined with Judges Ferguson and Quinn, producing unanimous decisions on commutation.

A thesis may be advanced: To have one rule of law displaced by a later contrary rule is the history of the law. It requires no citation of authority, however, to recall the storm of controversy engendered by shifts within the Supreme Court of the United States throughout its history. Adherents of *stare decisis* have reacted in direct proportion to the impact of the change. To create a military bench of final authority of only three judges, whose worldwide jurisdiction is exclusively concerned with the life, liberty, and to a lesser extent, property, of all members of the totality of the armed forces of the United States is to invite, and to accelerate the possibility of, shifts in decisional military justice. It is of more than passing interest to note that among the benches of final authority in the 50 states or this Union, only three are composed of three judges—Alaska, Delaware, and Nevada.<sup>65</sup> The overwhelming majority of states have a final bench of five or more judges. A three-headed tribunal is more familiar in administrative courts and boards whose jurisdiction, in general, does not approach the sensitiveness inherent in the judging of life and liberty. Admittedly, the Court is created under Article I of the Constitution, rather than Article III: concededly, decisions of the Court extending to death, to dismissal of an officer, or involving a general or flag officer, receive further review; nevertheless, it is contended that the question of increasing the bench of the Court of Military Appeals is well worthy of serious consideration by the Congress of the United States.

Let us now examine the treatment of commutation in the two major periods in the Court of Military Appeals<sup>66</sup> and then the current state of affairs.

<sup>65</sup> DESK BOOK, AMER. JURIS., DOC. NO. 72 (2d ed. 1962); cf. U.S. GOVERNMENT, GENERAL SERVICES ADMINISTRATION MANUAL, 356-542 (1962-1963).

<sup>66</sup> An excellent brief analysis is found in U.S. DEPT OF ARMY, PAMPHLET NO 27-101-95, pp. 3-11 (1962).

A. QUINN—LATIMER—BROSMAN (1951–1955)

After some preliminary skirmishing in dicta and peripheral cases,<sup>67</sup> a majority of Judges Latimer and Brosman formed and, the former writing an exhaustive opinion, held that a Board of Review, on determining that a sentence of a naval officer to dismissal was inappropriate, could not commute the sentence to one of the loss of 200 unrestricted numbers.<sup>68</sup> Judge Latimer, after an elaborate historical review, found that Congress, from the inception of military justice up to the formulation of the Uniform Code of Military Justice, had clearly: (1) recognized the difference between the power to commute and the authority to mitigate; (2) intended to keep the two separate; (3) granted only to the President or to the Secretary of the Navy authority to commute or change the nature of a sentence. With respect to the authority of a Board of Review under Article 66 of the Uniform Code, Judge Latimer announced that power to commute could not be implied from the general grant to "affirm . . . such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." He found corroboration of this in the language of Article 71 which specifically included the power to commute among the specified powers of the President and the Secretary of Defense or his designated assistants, and further corroboration in the language of the Manual. He interpreted the case of *Mullan v. U.S.*, discussed in an earlier section of this article, which had presented the identical issue, but

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<sup>67</sup> *U.S. v. Hunter*, 2 USCMA 37, 6 CMR 37 (1952); *U.S. v. Long*, 2 USCMA 45, 6 CMR 45 (1952); *U.S. v. Day*, 2 USCMA 416, 9 CMR 46 (1953). In this trio of peripheral cases, Quinn, Ch. J., concurred only in the result when Latimer, J., writing, expressed doubts as to Board of Review's power to commute, and Latimer, J., concurred only in the result when Quinn, Ch. J., writing, stated, in passing, that there was no factual necessity in the particular cases for return to a Board of Review to reconsider a sentence. When Latimer, J., wrote that a Board of Review could commute a death sentence to one of life imprisonment under a charge of premeditated murder where it had found the evidence sufficient to support only an included offense thereof, Quinn, Ch. J., concurred only in the result. *U.S. v. Bigger*, 2 USCMA 297, 8 CMR 97 (1953). To this extent, Latimer, J., acknowledged a limited power to commute to the extent necessary to substitute a legal sentence for the one which has now become illegal by reduction of the findings, basing his view on the necessity of harmonizing art. 66 with art. 59. However, he refused to go along with a similar power where the findings below were sustained, so that the adjudged death sentence had not become illegal. *U.S. v. Freeman*, 4 USCMA 76, 15 CMR 76 (1954). Quinn, Ch. J., concurred only in result. Again, when in *U.S. v. Cavallaro*, 3 USCMA 653, 655, 14 CMR 71 (1954) Latimer, J., wrote, in passing, that Congress has seen fit to grant certain reviewing authorities the right to commute or suspend the execution of a sentence, but it did not extend that authority to boards of review," Quinn, Ch. J., concurred only in the result. All had already agreed that Boards of Review cannot suspend a punitive discharge. *U.S. v. Simmons*, 2 USCMA 105, 6 CMR 105 (1952).

<sup>68</sup> *U.S. v. Goodwin*, 5 USCMA 647, 18 CMR 271 (1955).

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with reference to the power of the President, as no longer controlling in view of the changes in the law subsequent to the decision. The opinion closes with a strong statement :

In hopes we will state the law as it is now provided for in the Code, and restate what we believe the law always has been in military services. we sum up our views. Specifically, only the Chief Executive and the Secretaries of the Departments or their Assistants, if so designated, have the power to change a dismissal from the service to any other form of punishment. Only the President can change a sentence of death to confinement for life or for a term of years. Generally, the President and the enumerated Secretaries and their Assistants alone can commute a sentence, and we use the word 'commute' in its generally accepted sense, that is, change in form. Mitigation we restrict to a reduction in kind.

Quinn, Ch. J., strongly dissented from the conclusion "that a board of review cannot reduce a sentence of dismissal to punishment in a lesser amount when on the basis of the entire record it deems it appropriate to do so," citing Article 66. "I find the majority's conclusion objectionable as a matter of law and as a matter of common sense."

In view of the ultimate triumph of his views, an analysis of his reasons is appropriate : (1) Boards of review are far removed from command influence : Congress was well aware of this; therefore, the historic denial of commutation authority to the convening authority does not require a restrictive construction of Article 66. (2) Article 66 confers two powers over sentences; it speaks of affirming such "part" or "amount" of the sentence as the Board finds correct in law and fact on the basis of the entire record. "Part", to him, refers to divisible sentences; "amount" refers to indivisible sentences. "Consequently, I am persuaded that Congress intended to confer upon the board of review the power to approve a sentence which, while not necessarily a part of the whole, is lesser in amount than that adjudged by the court and approved by the convening authority." He finds further confirmation in the refusal of the Committee to heed the warning of the two chiefs of legal services to the effect that the language of Article 66 will give Boards of Review powers formerly possessed only by confirming authorities, and would include power to commute.<sup>69</sup> (3) The proper approach to the power of reviewing authorities when dealing with indivisible sentences (and later cases invoke the same yardstick with reference to the action of the convening authority, whose powers are described in Article 64 with similar phraseology to those Boards of Review) is whether their action substitutes a punishment which is lesser in "amount." In this view, technical differences between mitigation and commutation are no longer vital. (4) Even if the technical differences are considered, *Mullan*

<sup>69</sup> See text accompanying notes 54-58. *supra*.

*v. U.S.*,<sup>70</sup> holds that reduction from dismissal to loss of numbers is mitigation, and not commutation.

One other case presenting aspects of Board of Review powers arose before Judge Brosman's death. It was an unusual case,<sup>71</sup> in which, after a sentence to death for premeditated murder, and after a Board of Review affirmed the findings but reduced the sentence to life imprisonment, the then insanity of the accused was called to the attention of the Court of Military Appeals before which the matter was pending on certification of the question of the correctness of the Board of Review action. Three opinions were written on the interesting question of the effect of supervening insanity on the due course of appellate proceedings, each judge commenting hypothetically on what he would do if the merits were before him. Judge Quinn, of course reaffirmed his position of the general right of a Board of Review to "reduce" a death sentence to confinement for life. He added the gratuitous remark, "I do not imply that a board of review has the power to *commute*, which power, in my opinion, properly rests in the Executive and not in the Judicial branch of the Government. However, I need not now elaborate on my reasons for that view. Suffice it to note simply my objection to their intimation." Judge Latimer maintained that the court "in all probability, would be required to reverse the Board of Review and reinstate the death sentence." Judge Brosman opined that the Board might be able to act since it would otherwise be faced with a sentence which could not legally be executed.<sup>72</sup>

## B. QUINN—LATIMER—FERGUSON (1956–1961)

Although Judge Ferguson ascended the bench in 1956 to replace the late Judge Brosman, it was not until 1960 that an opportunity was presented for him to take a definite position on the commutation issue. That he would join Chief Judge Quinn might have been glimpsed when the two joined in two opinions bearing indirectly on the issue. Shortly after he went on the bench, the first of these, written by the Chief Judge for both, dealt with the affirmance by a Board of Review of a life sentence following conviction of premeditated murder, the Board saying that since the findings below were Correct, it could not reduce the sentence since it was the statutory minimum for premeditated murder.<sup>73</sup> All three judges rejected this position and construed the limits of punishment in the punitive articles not to be binding minima on appellate authorities, who there-

<sup>70</sup> See note 68, *supra*.

<sup>71</sup> *U.S. v. Washington*, 6 USCMA 114, 19 CMR 140 (1955).

<sup>72</sup> *Cf. C.S.v. Bigger*, 2 USCMA 297, CMR 97 (1953).

<sup>73</sup> *U.S. v. Jefferson*, 7 USCMA 193, 21 CMR 319 (1956).

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fore would be free to reappraise the appropriateness of the sentence. Judge Quinn added the phrase: "Subject to the possible difference between commutative and mitigative action." Judge Latimer, in his concurrence, clinging to his consistent position, opened by writing: "A majority of the Court has consistently held that a board of review may not change the form of a sentence, but that it may affirm any of its component parts on a reduced scale," which was the case here. In the second case, Judge Ferguson held for himself and the Chief Judge that an intermediate reviewing authority could change a fine to a forfeiture of the same sum of money, and overruled the statement to the contrary which appears in paragraph 88*c* of the current *Manual*.<sup>74</sup> He called the action mitigation, since he contended that it was a lesser punishment.<sup>75</sup> Judge Latimer, as may have been expected, condemned the action as forbidden commutation.

On April 8, 1960, in the now-leading case of *U.S. v. Russo*,<sup>76</sup> Judge Ferguson again joined Chief Judge Quinn and wrote that "whether it be termed commutation, mitigation, or merely a reduction in punishment, we hold that both the convening authority and a board of review have the authority to lessen the severity of a death penalty by converting it to dishonorable discharge and confinement (for life) at hard labor. Our prior decisions in which the contrary view was expressed are overruled." Predictably, Judge Latimer reacted violently.

An analysis of the two opinions reveals no surprises. Among other things, each side scraped up some additional alleged clues in the elusive hunt for the intent of Congress,<sup>77</sup> and Judge Latimer made an eloquent plea for *stare decisis*. In addition, his observations on the undesirable practical consequences of the new rule are worth scrutiny to enable an informed observer to draw his own conclusions on whether his dire prophecies have come to pass. The judge made the following points:

1. There is no great need to create the new rule as an alleged additional protection to accuseds, for Boards of Review can make recommendations to the Secretary and to the President, who, under his clemency powers in death cases, usually gives great weight to such recommendations.

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<sup>74</sup> *U.S. v. Cuen*, 9 USCMA 332, 26 CMR 112 (1958).

<sup>75</sup> He states three characteristics of a fine which make it more onerous than a forfeiture: It represents a debt which is owed to the government; it is payable regardless of whether the accused is paid or not, and collectible as any other civil monetary obligation; it may be enforced by providing in the judgment that a period of confinement be served if the debt is not paid.

<sup>76</sup> 11 USCMA 352, 29 CMR 168 (1960).

<sup>77</sup> Each picked over the scraps of language discussed in the earlier section of this article devoted to the congressional hearings.



2. Hundreds of military commanders and lawyers of field grade will now get a prerogative in death cases hitherto jealously limited in both the states and in the federal system to high executive officials or:

some boards manned with individuals of experience and judgment who have under their direction and control persons trained in penology and with the means to collect, evaluate, and consider clemency data. . . . Even with a parole and probation department, psychologists, psychiatrists, penologists, investigators and other employees who had majored in the study of punishment for crime to assist and advise, the decision to commute, or not to commute, was troublesome and charged with humanities neither apparent to the senses nor obvious to the intelligence. Convening authorities and members of boards of review must necessarily make their decisions principally from a cold and unilluminating record with few guideposts to chart their course. While I have no desire to cast aspersions on the capabilities of individuals who serve in those capacities, I do suggest that to force them to pass on the appropriateness of a death sentence is inconsistent with their experience, training, and lack of investigative processes or help.

3. "(B)y authorizing the convening authority and boards of review to commute all sentences, my associates may open up a Pandora box," which may lead to a "crazy-quilt pattern of punishment and not the uniformity hoped for by Congress. Each reviewer may use a different measuring rod and the Table of Maximum Punishments can be bartered away."

4. Directing a criticism at Boards of Review, he pointed out that :

the officers who have the superior opportunity for personalized evaluation of the offender as well as the responsibility for training the command and winning the war, may be handicapped not only in disciplining members of their organization but in rehabilitating these offenders who may be worthy. Different types of punishment may have a different effect on different men, and the man at the trial level ought to know best the necessary and appropriate punishment to be imposed.

5. He attempted to revive *Ex parte Wells* and to discount *Biddle v. Perovich*, without citing either case,<sup>78</sup> by announcing that "beneath the doctrine of commutation is the right of the accused to accept the substitution. His appeal to a convening authority and board of review is automatic, and he may disagree with them on whether the newly imposed punishment is less than was meted out by the court-martial. I wonder if he is not entitled to a hearing on that issue and whether all reviewing authorities will become boards for the reimposition of sentences." Although he amplified this in the *Christensen* case<sup>79</sup> to a suggestion that "it would appear much the better procedure to offer the accused an opportunity to reject any proposed commutation," the suggestion died later in the *Johnson* case,<sup>80</sup> where

<sup>78</sup> See notes 17 and 19, *supra*.

<sup>79</sup> *G.S. v. Christensen*, 12 USCMA 393, 30 CMR 393 (1961).

<sup>80</sup> *U.S. v. Johnson*, 12 USCMA 640, 31 CMR 226 (1962).

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after Latimer had left the bench, a unanimous court pointed out that "whether the accused desired or consented to the change in sentence" was not relevant, and expressly repudiated the suggestion.

6. He feared that appellate channels would be clogged.

**Sot** only are convening authorities and boards of review ill-equipped properly and wisely to discharge this new power, and thus under a tremendous handicap, but, in addition, it must be noted that the exercise—for better or worse—of that power of commutation by authorities who formerly were not believed to possess it, will necessarily impede completion of consideration of cases on their merits . . .

7. He put on a parade of horrors and, commenting on the new and wholly unrestricted downward revision powers over all sentences, said that "it inevitably follows that a convening authority or a board of review can commute, reduce, or abate entirely a death sentence and that if in their discretion they decide a small fine is adequate, the Government is without remedy to review their ruling."

He concluded his scorching opinion on the note that the new rule "tosses the gravest responsibility imposed by a criminal code upon the shoulders of too many individuals who are unconditioned and ill-equipped for the burden."

The *Russo* case marks the end of the period of labels, and of the tyranny of labels: mitigation good, commutation bad! On first impression, it creates a deceptively-simple test: Does the substituted punishment lessen the severity of the original punishment? But below the surface, uncertainty has taken the place of inflexibility.

### V. PANDORA'S BOX OF CHALK AND CHEESE

A good starting point in understanding the difficulty is Judge Rosman's cataloging of all military punishments under five heads:<sup>81</sup> loss of life; loss of reputation, typified by a punitive discharge; loss of money, as by fine or forfeiture; loss of physical freedom; and loss of military grade, which combines loss of reputation and loss of money, and therefore is given a separate classification.

With this great variety of punishments, several possible approaches may be taken. Judge Rosman's thesis was that except for the roughest practical purposes, no one category is comparable to any other category to determine which of two disparate punishments is the more severe—for one may not "compare chalk with cheese." Therefore, he said, to permit any logical comparison at all, the new punishment must stay within the same category as the old.<sup>82</sup>

<sup>81</sup> *U.S. v. Kelley*, 5 USCMA 259, 264, 17 CMR 259, 264 (1954).

<sup>82</sup> Art. 63(b), UCMJ. Analytically, there is a difference in criteria: On rehearings, the new sentence cannot be greater (with two exceptions not here relevant); in commutative action, the changed sentence must be lesser. See

He pointed out that his brethren on the court in the instant case accepted a rough-and-ready test for rehearings—is the substitute punishment one which “every reasonable person” would conclude is not greater <sup>83</sup>—but concluded, somewhat glumly, “**I know** of no reagent which can serve to determine which of us is correct. It may come down to a matter of whether one prefers chocolate or vanilla.”

A second approach would be to legislate a scale of values. The British Army Act has accomplished just that. It contains a scale of permissible punishments arranged in order of severity for commutation purposes.<sup>84</sup> Illustrative of the difficulty of creating such a scale, however, is the complexity of modern American military sentence, particularly when fragmented and divided among the four non-capital punishments available to the routine general court-martial case even under the Table of Maximum Punishments.

The third approach, sentence-by-sentence review, has been adopted by the Court. Even with the ability to certify questions to the Court, it will require many cases to ring all the variables. This will necessarily inhibit staff judge advocate advice, and the views of the individual Boards of Review even within one armed force. For

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note 13, *supra*, commenting on the loose use of words in describing the commuted sentence, citing as samples CORWIN, *op. cit. supra* note 22; Latimer, J., writing in *U.S. v. Bigger*, 2 USOMA 297, 305, 8 CMR 97, 105 (1953) and in *U.S. v. Christensen*, 12 USCMA 393, 395, 30 CMR 393, 395 (1961). The latest word was spoken by Judge Ferguson in *U.S. v. Johnson*, 12 USCMA 640, 643, 31 CMR 226, 229 (1962), who carefully rules out even exactly-equal commuted sentences (assuming such possible identity) on the ground that such equality would logically negative the inappropriateness of the original sentence which is required as a predicate for commutative action by the language of arts. 64 and 66(c).

Bednar, 24-25, accepts Judge Brosman's view as providing a workable solution to the commutation problem, viz., confining commutation to mitigation. His statement that the same limit applies both to rehearings and to commutation may be questioned in the light of the distinctions drawn above. In suggesting, at p. 25, that a punitive discharge can be “commuted” to loss of military grade, he misreads the judge, who would apparently be satisfied only with reprimand.

Judge Latimer, in *U.S. v. Christensen*, *supra*, suggested that “(t)here being no common denominator in the many form's of permissible penalties, we conclude the best workable rule requires an affirmation of his judgment on appeal unless it can be said that, as a matter of law, he has increased the severity of the sentence.” However, his opinion was repudiated (perhaps because of its espousal of the right of an accused to accept or refuse commuted punishment) in *U.S. v. Johnson*, *supra*. In *Johnson*, Judge Ferguson listed and discussed what he conceived to be the basic principles applicable to indivisible sentences. While he announced that the action taken must “lessen its severity,” no test was suggested. Nor has any appeared in subsequent cases, at least until the writing of this article.

<sup>83</sup> The majority quotes from another rehearing case, *U.S. v. Stippel*, 4 USCMA 30, 59, 15 CMR 50, 59 (1954).

<sup>84</sup> Secs. 71(2) and 72(2) of the British Army Act of 1955. An examination of the briefs of the Government reveals that appellate counsel urged the Board of Review, with minor success, and the Court of Military Appeals, with no

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illustration, in the contemporaneous *Johnson*, *Fredenberg*, and *Rodriguez-Garcia* cases,<sup>85</sup> all of which involved a general court-martial sentence of confinement for one year, forfeiture of varying sums of money, and two of which reduced the accused to the lowest enlisted grade, three Boards of Review passed on commutation to a punitive discharge by the convening authority. One Board held that commutation to a bad-conduct discharge was invalid; two Boards held that commutation to a dishonorable discharge was proper. The Court held that the action was illegal in all of the cases. Further, under its views, the consent of the accused to the offer of commuted punishment was irrelevant to the issue of the powers of the convening authority and of Boards of Review.

Even if the convening authority, following one suggestion,<sup>86</sup> attempts to stay within the classes of punishments adjudged by the court-martial so as to endeavor only to mitigate, fragmented sentence<sup>9</sup> where the court imposes some of each of its four major punishment alternatives may well leave combinations of punishments which will require careful scrutiny to assure over-all mitigation.

Already, collateral considerations have assumed importance in weighing the comparative severity of sentences. In *Christensen*,<sup>87</sup> attempting to assess the relative severity of suspension from rank as compared to forfeiture of money, the Court became involved in the accused officer's loss of priority in the selection of quarters. The Court also reached out to the punishments impossible on an officer under Article 15, which while authorizing a partial forfeiture for one month, does not permit suspension from rank or command.

One other undesirable consequence which should be pointed out is that if the convening authority cannot commute a term of years to a punitive discharge, the doubtful practice of eliminating an accused from the service by administrative action in lieu of or following court-martial may be encouraged.<sup>88</sup>

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success, to consider the scale in *U.S. v. Johnson*, 12 USCMA 640, 31 CJIR 226 (1962) *U.S. v. Fredenberg*, 12 USCMA 646, 31 CJIR 232 (1962), and *U.S. v. Rodriguez-Garcia*, 12 USCMA 647, 31 CJIR 233 (1962). The British Act, in part sets up the sequence of (1) death, (2) imprisonment, and (3) ignominious discharges. The Court of Military Appeals, in the above trio of cases, placed punitive discharges above imprisonment for one year. Perhaps the multiplicity of veterans' benefits influenced the court, aside from more technical considerations of intent of Congress.

<sup>85</sup> *Supra* note 84.

<sup>86</sup> Bednar, 24-25, 33-34.

<sup>87</sup> 12 USCMA 393, 30 CMR 393 (1961).

<sup>88</sup> Bednar, 14, comments that "the commander who uses administrative procedures in lieu of established judicial machinery violates the spirit of the Code and flies in the face of the very reason for the distinction between administrative and judicial discharges." The subject is under scrutiny by Congress, which seems to be concerned with the lack of procedural safeguards available to the subject

Although cases are still in the middle of the evolutionary process, it may be worth while to recapitulate briefly the state of the present authorities. For convenience, they will be grouped, so far as possible, under the Brosman categories.

## A. LOSS OF LIFE

Under the generally accepted theory that no other lawful punishment equals the severity of a death sentence, it would seem that any other lawful punishment can be substituted therefor. Thus, it is clear that life imprisonment plus a punitive discharge may be substituted.<sup>89</sup> The *Manual* provides: "A dishonorable discharge is by implication included in a death sentence. When life imprisonment is adjudged, the court shall also adjudge dishonorable discharge and total forfeitures."<sup>90</sup> The drafters state this was written on the basis of a series of opinions which held that a death sentence operates *per se* to dishonorably discharge a member of the armed forces; the requirement that when life imprisonment is adjudged, the court shall also include a dishonorable discharge and total forfeitures is apparently a policy rule based on prior cases holding such action to be within the power of the court.<sup>91</sup>

## B. LOSS OF REPUTATION

*Punitive Discharges: Dishonorable Discharge Reduced to Bad-Conduct Discharge.* Implicit in *U.S. v. Johnson*<sup>92</sup> is that an expressly adjudged dishonorable discharge may be reduced to a bad-conduct discharge.<sup>93</sup> However, no administrative type discharge may be substituted.<sup>94</sup>

*Punitive Discharge to Term of Years.* *U.S. v. Prow*,<sup>95</sup> noting that "an executed punitive discharge terminates military status as completely as an executed death penalty ends mortal life," sustained reduction by the convening authority of a bad-conduct discharge to confinement and forfeitures in a modest quantity. It may be surmised

of administrative action. Note Quinn, Ch. J., concurring in *U.S. v. Phipps*, 12 USCMA 14, 16, 30 CMR 14, 16 (1960).

<sup>89</sup> *U.S. v. Russo*, 11 USCMA 352, 29 CMR 168 (1960); *U.S. v. Jefferson*, 7 USCMA 193, 21 CMR 319 (1956).

<sup>90</sup> MCM, 1951, para. 126a.

<sup>91</sup> U.S. DEPT OF DEFENSE, LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, 19.71, 176. But see *U.S. v. Jones*, 10 USCMA 122, 27 CMR 196 (1959) which casts doubt on the legality of the statement in the Manual.

<sup>92</sup> 12 USCMA 640, 31 CMR 226 (1962).

<sup>93</sup> MCM, 1951, para. 88e states: "Thus a sentence of dishonorable discharge may be mitigated to bad conduct discharge, but a bad conduct discharge may not be mitigated to any other punishment."

<sup>94</sup> *U.S. v. Plummer*, 12 USCMB 18, 20 CMR 18 (1960).

<sup>95</sup> 13 USCMA 63, 32 CMR 63 (1962).

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that if adjudged by a special court-martial, substitution of the maximum limits of that court martial's powers, *viz.*, confinement for six months plus forfeiture for a like period, would not be regarded as an unreasonable substitute punishment.<sup>96</sup> By parity of reasoning, substitution of confinement and forfeitures for a dishonorable discharge or a bad-conduct discharge adjudged by a general court-martial should be valid, perhaps up to the maximum permitted by the Table of Maximum Punishments.

*Dismissal to Loss of Numbers.* While *U.S. v. Goodwin*<sup>97</sup> held that this could not be done, it is clear that the reversal of this case in *U.S. v. Russo*,<sup>98</sup> now permits this.<sup>99</sup>

*Suspension from Bank for One Year to Partial Forfeitures for One Year.* In *U.S. v. Christensen*,<sup>100</sup> such action was held proper. In dictum, Judge Latimer indicated that :

had the convening authority imposed total forfeitures, it could be said reasonably that the punishment was in excess of that imposed by the court. While the outside limits pose no problem, those in between require a certain amount of guesswork. However, in the case at bar, it is neither feasible nor necessary for us or anyone else to fix the precise amount which would change the forfeiture to a more severe form of punishment, and that we do not propose to do.

*Dismissal and Total Forfeitures to Partial Forfeitures.* A Board of Review held this to be pure mitigation even prior to the decisional shift regarding commutation powers.<sup>101</sup>

"*Dishonorable Discharge*" of *Officer to Dismissal*. Corrective action to this effect by the convening authority was sustained in *U.S. v. Bell*<sup>102</sup> and *U.S. v. Alley*.<sup>103</sup>

### C. LOSS OF MONEY

Practically speaking, most action will involve reduction in kind, thus presenting no particular problems of commutative action. Whether a change from fine to forfeiture is mitigation or commutation

<sup>96</sup> Cf. *U.S. v. Brown*, 13 USCMA 333, 32 CMR 333 (1962) where a sentence of a general court-martial to a bad-conduct discharge was commuted by the convening authority to confinement for six months plus partial forfeitures for a like period.

<sup>97</sup> 5 USCMA 647, 18 CNR 271 (1955), in which a principal division was over the meaning of *U.S. v. Mullan*, 212 U.S. 516 (1909).

<sup>98</sup> 11 USCMA 351, 29 CMR 168 (1960).

<sup>99</sup> *U.S. v. Plummer*, 12 USCMA 18, 20 CMR 18 (1960).

<sup>100</sup> 12 USCMA 393, 30 CMR 393 (1961).

<sup>101</sup> ACM 5841, McDevitt, 8 CMR 630 (1932). See *U.S. v. Batson*, 12 USCMA 48, 30 CMR 48 (1960).

<sup>102</sup> 8 USCMA 193, 24 CMR 3 (1957).

<sup>103</sup> 8 USCMA 559, 25 CMR 62 (1958).

produced the usual split in the old court, the majority demonstrating that the latter is less onerous than the former.<sup>104</sup>

## D. LOSS OF PHYSICAL FREEDOM

The case of *U.S. v. Johnson*,<sup>105</sup> dealt with an attempt by the convening authority to commute confinement for one year and total forfeiture to a punitive discharge—here, a bad-conduct discharge; in the companion case of *U.S. v. Fredenberg*,<sup>106</sup> a dishonorable discharge; in the companion case of *U.S. v. Rodriguez-Garcia*,<sup>107</sup> to a suspended bad-conduct discharge. Relying on three factors—one, that Congress has restricted punitive discharges to courts-martial; two, that a punitive discharge entails serious post-military consequences; and three, that the convening authority “had before him a sentence which he, in fact, found appropriate, but which if inappropriate in amount, could have been reduced in kind” the unanimous court invalidated all three actions. It emphasized the “stigma” attached in modern society to punitive discharges, and quoted with approval Judge Brosman’s statement in *U.S. v. Kelley*,<sup>108</sup> that “I doubt that scarcely any punishment is more severe than a punitive discharge.” It may be projected that similar action cannot be taken even with reference to a relatively long period of imprisonment; indeed, under the construction of congressional intent made in the case, one doubts whether any sentence short of life imprisonment could be commuted to a punitive discharge. A sentence to life imprisonment which also includes a dishonorable discharge, however, could be reduced to a term of years, and the dishonorable discharge retained or a bad-conduct discharge substituted.

## E. LOSS OF MILITARY GRADE

No cases have been found in which aspects of commutative action are involved. The closest in point are the few officer suspensions from rank, already noted under Judge Brosman’s second category, loss of reputation.

## VI. SUMMARY AND CONCLUSION

In the history of American military law up to 1950, there was a consistent pattern to reserve power to commute sentences, in the accepted military definition of this concept, to departmental or higher level by express congressional language. The Uniform Code of Mili-

<sup>104</sup> *U.S. v. Cuen*, 9 USCMA 332, 26 CMR 112 (1958), and discussion at notes 74 and 75, *supra*; *U.S. v. Caid*, 13 USCMA 348, 32 CMR 348 (1962).

<sup>105</sup> 12 USCMA 640, 31 CMR 226 (1962).

<sup>106</sup> 12 USCMA 646, 31 CMR 232 (1962).

<sup>107</sup> 12 USCMA 647, 31 CMR 233 (1962).

<sup>108</sup> 5 USCMA 259, 17 CMR 239 (1954).

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tary Justice adopted looser language in defining the power over sentences of the convening authority and of Boards of Review.

Within four years after the creation of the three-judge Court of Military Appeals, two opposing constructions of the sentence review power evolved, and the next five years, following one change in the composition of the Court, saw a reversal of the field.

In the earlier Quinn—Latimer—Brosman court, over the consistent dissent of the Chief Judge, the majority of two continued to invoke the traditional historical division of reviewing powers over sentences. When Judge Ferguson succeeded Judge Brosman, a new majority was formed, which adopted the deceptively simple yardstick that both convening authority and the Board of Review may change the nature of an adjudged sentence so long as the action taken, viewed by a reasonable man, lessens the severity of the punishment and is one which could legally be adjudged by the Court. Given the diverse nature of the broad categories of permissible military punishments, the question whether a substituted punishment satisfies this test where it is of a different nature will engender controversy which will not be resolved until many combinations of commuted punishments are tested by the Court of Military Appeals.

An undesirable period of uncertainty has necessarily resulted, which may be compounded by the potentiality of further shifts in the future in a court of final authority as small as three.

No ready solutions seem available. While the system of military justice must be essentially fair, it is submitted that an intolerable situation has developed which undercuts the essentials of stability and certainty required in the military establishment. Uncertainty in civilian law, requiring case-by-case resolution, undesirable as it may be, is more easily assimilated by society in general. Within the military society, however, so long as command responsibility remains an imperative, uncertainty of authority and undermining of authority cannot long be tolerated.

Unless the period of uncertainty can be quickly resolved (and the power to certify cases is no guarantee that appropriate ones will be forthcoming in such quantity as to resolve the problem) congressional action to clear the air would seem to be the only reasonable alternative. Congress, having enacted an unworkable standard of power, should be asked to change the standard. Only two workable alternatives suggest themselves.<sup>109</sup> One is to legislate a scale of punishments following

<sup>109</sup> To suggest legislation to the effect that commuted punishment may be substituted if the accused consents thereto may well be a futility. A number of objections may be predicated: It smacks of unconstitutionality if a greater punishment may be imposed under the guise of consent: it will only beg the ultimate question, for on a mandatory review, the commuted sentence will still have to



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the broad pattern of the British Army Act, with accompanying changes in the power to impose a punitive discharge other than by sentence of a court-martial. The other is to legislate a return to pure mitigation, with no change permitted in the nature of the adjudged punishment. Realistically, the second appears more practicable than the first. The Court of Military Appeals has bestowed an uncertain grant of powers; Congress should take it away.

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pass the uncharted test of remission; it will inevitably invite flanking attacks to repudiate the consent, somewhat reminiscent of the problem of the "improvident plea" under a negotiated plea of guilty; and finally, in the related area of Presidential action, the power of the Executive cannot be made to depend on the wishes of the wrongdoer. *Biddle v. Perovich*, 274 U.S. 480 (1927). Parallelism would require the same approach in military justice.



# LEGAL ASPECTS OF MILITARY OPERATIONS IN COUNTERINSURGENCY+

By MAJOR JOSEPH B. KELLY\*\*

## I. INTRODUCTION

Counterinsurgency, by definition,<sup>1</sup> embraces a broad spectrum of social, political, military and economic activities. However, in this article, the legal aspects of the military action will be stressed, not because this activity is necessarily the most important, but because it is one of the most immediately pressing problems for the U.S. Army in Southeast Asia, and because other legal aspects of counterinsurgency are very similar to those that arise from the presence of U.S. servicemen abroad, whatever their mission.

Two aspects of the military phase of counterinsurgency will be examined: First, the international rules surrounding civil wars, particularly those of an insurgency nature; second, the legal status of participants in insurgency type warfare.

## II. CIVIL WARS IN INTERNATIONAL LAW

The apparent reluctance of the Soviet bloc to engage the West directly in armed conflict has caused an intensification by the international communist movement of so-called "wars of liberation." \*

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\*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup>Counterinsurgency includes those military, paramilitary, political, economic, psychological and civic actions taken by a government to defeat subversive insurgency. Change 1 to DICTIONARY OF THE U.S. MILITARY TERMS AND JOINT USAGE (July 2, 1962).

<sup>2</sup>This name is derived from Premier Khrushchev's address of January 6, 1961, part of which is as follows: "Liberation wars will continue to exist as long as imperialism exists, as long as colonialism exists. These are revolutionary wars. Such wars are not only admissible but inevitable, since the colonialists do not grant independence voluntarily. . . . What is the attitude of the Marxists toward such uprisings? A most positive one. These uprisings must not be identified with wars among states, with local wars, since in these uprisings the people are fighting for implementation of their right of self-determination, for independent social and national development. These are uprisings

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These "wars" are civil wars because they are directed against duly established governments and are confined entirely within the borders of the particular State concerned. It is usually by the technique of such civil wars that the communists have attempted recently to gain control of established governments. This technique of conquest requires that civil wars be understood. Such wars have traditionally been classified as either belligerencies or insurgencies. The law pertaining to civil wars and the assistance permitted by outside States has in the past varied with each war. These rules evolved when civil wars were principally local matters; they may not be adequate for these conflicts as vehicles for international conquest. The discussion which follows may seem elemental to those conversant with international law. Such discussion is necessary, however, not only because those actually involved in counterinsurgency operations are not international lawyers, but also because it is with these basic principles that the real difficulties are encountered which prevent to a great extent the application of law to these revolutions.<sup>3</sup>

### A. *BELLIGERENCY*

#### 1. *Nature of Belligerency*

When a revolt takes place within a State, the revolutionaries have for their goal either the reformation of the existing government by force or the creation of a new State out of a portion of the old. When this revolutionary movement has achieved the following characteristics it has been considered to have acquired the status of a belligerency:<sup>4</sup>

- (1) A state of general hostilities.
- (2) Occupation of a substantial part of the national territory by the revolutionaries.
- (3) Possession of a government administering such territory.

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against rotten reactionary regimes, against the colonizers. The Communists fully support such just wars and march in the front rank with the peoples waging liberation struggles." (Address by N. K. Khrushchev to Higher Party School, Academy of Social Sciences, Institute of Marxian-Leninism of the Central Committee, Communist Party of the Soviet Union, January 6, 1961.)

These "wars" have not conflated themselves to colonial areas, but, as President Kennedy told the United Nations General Assembly on September 25, 1961, are now aimed at the independent nations of Southeast Asia (45 *U.S. DEP'T STATE BULL.* 619 at 623 (1961)).

<sup>3</sup>Thomas Jefferson wisely counseled "When principles are well understood, their application is less embarrassing." Quoted in I MOORE, *DIGEST OF INTERNATIONAL LAW* 120 (1906). So too is their modification if they are no longer completely valid.

<sup>4</sup>II LAUTERPACHT, *OPPENHEIM'S INTERNATIONAL LAW* 249 (7th ed. 1952). See also the American cases of *The Three Friends*, 163 *U.S.* 1, 63 (1896) and *The Ambrose Light*, 25 *Fed. Rep.* 408 (1883) both of which, while dealing with conditions of insurgency, discuss the requirements for a condition of belligerency.

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(4) Observance of the rules of warfare on the part of the revolutionary forces acting under a responsible authority. The armed force which the revolutionaries possess must, therefore, meet the standard of a traditional army. This standard requires that the members bear their arms openly, be commanded by a person responsible for his subordinates, have a fixed distinctive sign recognizable at a distance and obey the laws of war.<sup>5</sup>

(5) The practical necessity for third States to define their attitude toward the revolutionary movement.

These requirements are fairly stringent. A revolution, from its very nature, is never a well-ordered thing, particularly in its early stages. Yet, these requirements have been imposed for a purpose. International conflict has serious legal consequences in the international community.<sup>6</sup> It cannot be taken lightly. It has been far more practical for international law to leave most civil strife where it was, inside the State affected; the exception has been that civil strife which met the criteria required of a belligerency.

### 2. *The Legal Effect of the Status of Belligerency*

The legal effect of the status of belligerency is that the hostilities become *international* in character. They are thus governed by all the customary laws of war that pertain to hostilities between States.<sup>7</sup> These laws are considerable and bring into play the numerous rules for the handling of prisoners of war, the control of the civilian populations, the care of the sick and wounded, the treatment of captured guerrillas, the exercise of belligerent rights at sea, and the obligations of neutrality. United States history offers a classic example of a status of belligerency in the Confederacy during the American Civil War. It had a government which ruled over substantial territory and fought the North with a regularly established army.<sup>8</sup>

<sup>5</sup> See U.S. DEPT OF ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956), para. 64 for an explanation of these characteristics. The existence of such an army is not enough. This army must also act under the direction of the "government" of the rebel. I HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND AS APPLIED BY THE UNITED STATES 201 (2d ed. 1946), quoting Beale, *The Recognition of Cuban Belligerency* 9 HARV. L. REV. 407 (1896).

<sup>6</sup> Authorities, in the past, were keenly aware of the legal implications of international wars because conflict affected an exceptional modification of the laws of an international society. They, therefore, sought to determine precisely whether an international war or a civil war existed in order accurately to establish rules to be applied. For example, see BORCHARD, *FOUR'S INTERNATIONAL LAW CODIFIED* 533-534 (1918); Beale, *op. cit. supra* note 5, at 406.

<sup>7</sup> FM 27-10, *op. cit. supra* note 5, para. 11a.

<sup>8</sup> The controversy between the United States and Great Britain over the belligerency of the Confederacy fills a large place in the literature of international law following 1861. See I MOORE, *DIGEST OF INTERNATIONAL LAW*, para. 66 and I CLAIMS OF U.S. AGAINST GREAT BRITAIN (1869).

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Because of the far-reaching legal consequences of a belligerency, it is important that the distinction between insurgency and belligerency be one easily discernible from the facts; however, such is not the case. There has been a tendency on the part of States, particularly in this century, to withhold recognition of belligerency even if the revolutionaries in fact possdss a government, hold substantial territory and have an organized armed force in the field.<sup>9</sup> The result is that it is sometimes difficult to tell from the facts alone that a certain civil war is in a stage of insurgency or belligerency. The recognition by governments of this fact has become a prerequisite.<sup>10</sup> Since one government is not bound by the recognition practice of another, it is possible that a revolutionary group may be a belligerency in the eyes of some States and not in others. For example, during the First World War, the allies recognized as a belligerent the army composed of Czechs and Poles which was fighting against the Central Powers.<sup>11</sup> The Czech and Polish Republics had not yet been founded. Austria, Hungary and Germany did not extend such recognition.<sup>12</sup>

The chief difficulty faced today is not contradictions resulting from some States recognizing belligerency and others not, but from a failure of *any* State to extend such recognition. Recognition of any sort is usually withheld until the insurgent is successful in overthrowing the established government. Such practice of States and the legal implications thereof would appear to make urgent the application of more protection to *de facto* belligerency than that presently afforded. The non-recognition practice here, though it leaves much to be desired as far as the protection of combatants is concerned, nevertheless has the effect of confining the conflict.

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<sup>9</sup> I HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 319-21 (1940).

<sup>10</sup> See *The Three Friends*, 166 U.S. 1, at 63 (1896), wherein the Supreme Court looked entirely to the Executive Branch to tell it if the insurgents in Cuba were recognized as belligerents before permitting the insurgents to exercise belligerent rights at sea. In addition, 33 U.S.C. 383 has been interpreted as permitting a private vessel to resist the aggression of an insurgent not yet recognized as a belligerent (WILSON, *INTERNATIONAL LAW* 43 (1939)).

<sup>11</sup> CASTRIEN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 90 (1954). See also I HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 319 (1940), wherein the author concludes that this may not have been strictly speaking an act of recognition but a war measure.

<sup>12</sup> The refusal of Germany to extend such recognition had the effect of denying Poland international personality as far as Germany was concerned. This is clear from the opinion of the Permanent Court of International Justice in the case concerning certain German interests in Polish Upper Silesia, wherein the court said that an armistice could not be concluded by two parties, one of which was not recognized as a belligerent by the other, and that as no such recognition had been granted by Germany to Poland the latter could not be regarded as a contracting party to the Armistice agreement of November 11, 1918. (Per. Ct. Int. Jus., Judgment 7 [Merits], May 23, 1926, ser. A, *So* 7, p. 27; I HILTON, *WORLD COURT REPORTS* 510.628 (1934)).

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## B. INSURGENCY

### 1. *The Nature of the "Status" of Insurgency*

It is important to understand the concept of belligerency before discussing insurgency, because the insurgency movement amounts to an incomplete belligerency. Among the most important defects of an insurgency are its failure to control territory and the lack of a distinguishing mark for its army. Hostilities are usually waged by clandestine forces which melt away at the approach of the government troops, only to strike by surprise at some other point. Their purpose is not to hold territory or to engage the government troops in direct combat, but rather to wage a guerrilla type war where they can lose themselves in the civilian population by posing as peaceful citizens. Insurgents, therefore, are organized bodies of men who, for public political purposes, are in a state of armed hostility against the established government.<sup>13</sup>

The purpose of the rebels must be political rather than criminal. Equally important to the existence of an insurgency is the inability of the established government to control or to suppress the rebellion quickly. This inability of the government creates the need for the establishment of some international rules not only for the conflict between the two groups within the State, but also for the relations of the legitimate government and the insurgents with other States. In the main, however, these rules are lacking. Nevertheless, at some point it is necessary for foreign States to acknowledge that there exists in another State something more than a riot.<sup>14</sup> The point where this situation seems to come into being is when the insurgent government develops into an actual threat to the continuing rule of the present government, or when the success of the insurgents is such that they are able to interfere with the normal foreign intercourse between the legitimate government and other States.<sup>15</sup> This condition is

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<sup>13</sup> WILSON AND TUCKER, *INTERNATIONAL LAW* 63 (8th ed. 1922).

<sup>14</sup> For example, Secretary Hay recognized the possible need for dealing with insurgents in 1899, when writing to the U.S. Minister to Bolivia, "You will understand that you can have no diplomatic relations with the insurgents implying their recognition by the United States as the legitimate government of Bolivia, but that short of such recognition, you are entitled to deal with them as the responsible parties in local possession to the extent of demanding for yourself and for all Americans within reach of insurgent authority . . . fullest protection for life and property." *U.S. Foreign Relations* 105 (1899).

<sup>15</sup> WILSON AND TUCKER, *op. cit.*, *supra* note 13, at 64. Both of these elements were present in Cuba's revolution against Spanish rule toward the end of the last century. In 1896 President Cleveland issued a proclamation which recognized the existence of an armed insurrection in Cuba and cautioned all persons in the United States to obey our neutrality laws. Two years later the Supreme Court had occasion to evaluate this proclamation. It concluded that "... here the political department has not recognized the existence of a defacto belliger-

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clearly apparent in Vietnam today and recently in Greece, Malaya, Algeria, Cuba and Laos. It characterizes, more than any other type, warfare of the twentieth century since World War 11.

### 2. *The Legal Effect of the "Status" of Insurgency*

The condition of insurgency has historically few international legal consequences, because, at least up until 1949, there was little that could be ascribed to a "status of insurgency" in international law in contrast to the well recognized consequences of a belligerency.<sup>16</sup> Since 1949, however, by virtue of the Geneva Conventions of that year, there has come into international parlance the phrase "armed conflict not of an international character."<sup>17</sup> The applicability of the Geneva Conventions to such conflicts, which are essentially conditions of insurgency,<sup>18</sup> is centered in Article 3 of each of the four conventions. The application of this Article to captives will be the first of two aspects of these civil conflicts discussed.

a. *The treatment of captives.* The 1949 Geneva Conventions have scored a breakthrough in the law in regard to the treatment of captives in armed conflict not of an international character.<sup>19</sup> The United States Senate, on 6 July 1955, by a vote of 77-0, gave its consent to ratification of these treaties by the President.<sup>20</sup> All four con-

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ent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare . . . ." *The Three Friends*, 166 U.S. 1, 64 (1899).

<sup>10</sup>Recognition of insurgency by foreign governments amounts to little more than an acknowledgment of the right of the insurgents to govern those areas under their *de facto* control and does not recognize belligerent rights regarding foreigners. JACOBINI, *INTERNATIONAL LAW* 41 (1962); SCHUSCHNIGG, *INTERNATIONAL LAW: AN INTRODUCTION TO THE LAW OF PEACE* 90-93 (1959); and BRIGGS, *THE LAW OF NATIONS* 998-1004 (1932).

"Art. 3 of the four 1949 Conventions on the Protection of (1) the Sick and Wounded in the Field; (2) Sick, Wounded and Shipwrecked at Sea; (3) Prisoners of War; and (4) Civilians. 6 U.S.T. & O.I.A. 3114, 3217, 3316, and 3516.

<sup>15</sup>The delegates to the diplomatic conference which preceded the adoption of the 1949 Conventions were aware of the vagueness of the phrase "armed conflict not of an international character," and many sought to clarify it by proposing certain requirements for such a conflict before Art. 3 would apply. Most of these proposed requirement.. were descriptions of belligerency, which if adopted would have effectively prevented Art. 3 from contributing anything to the existing law on civil wars. FIKAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, vol. II-B, p. 121, The International Committee of the Red Cross has rejected any such narrow application of Art. 3 (PICTET, COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (1960)).

<sup>19</sup>See PICTET, COMMENTARY ON THE IV GENEVA CONVENTION RELATIVE TO PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Geneva: International Committee of the Red Cross, 1958), pp. 25-44, for the background and explanation of each paragraph of Article 3.

"33 U.S. DEP'T STATE BULL. 69 (July 11, 1956); Baxter, *The Geneva Conventions Before the U.S. Senate*, 49 Am. J. Int'l L. 550 (1955).



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ventions have an identical Article 3. This Article, because of its importance, is reproduced in full :

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions :

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons.

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ;

(b) taking of hostages ;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment ;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Although the Geneva PW Convention contains 143 articles and the Geneva Civilian Convention 159 articles, all of which, with the exception of Article 3, pertain to conflicts of an international character, this one article, Article 3, has turned out to be the most important of them all to date, because it is the only one pertaining to almost all the conflicts in recent years. It has not fared well, however. One writer has commented sadly that it has been violated by both sides more than observed.<sup>21</sup> This is unfortunate. Leniency on the part of the established government toward captured guerrillas is dictated not only by the obvious intent of this article, but also by the basic psychological problem posed by a civil war—the problem of converting the dissatisfied insurgent into a friend or ally.<sup>22</sup>

<sup>21</sup> Greenspan, *Legal Aspects of Unconventional Warfare*, a part of a symposium on unconventional warfare in 341 THE ANNALS 30 (1962).

<sup>22</sup> This point was stressed by the Special Operations Research Office of The American University, Washington, D.C., in their study *The Legal Status of Participants in Unconventional Warfare*, at 44 (Dec. 1961).

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A closer examination of Article 3 may throw some light on the reasons for its violations. The first paragraph states that "each Party to the conflict" is bound to apply its provisions. One party is the established government; the other is the insurgent.<sup>23</sup> The former is fighting an elusive foe, one with whom it cannot come to grips, like a man fighting a swarm of bees. The latter party, the insurgent, often reflects poor education, organization and discipline, and is driven by a hatred of almost everything connected with the established government. Terror is often his objective,<sup>24</sup> and the government's answer may be terror in return. In fighting this insurgent it cannot see, the established government may also think it can get information it vitally needs by torturing the few insurgents it captures. Both sides may at times tend to shoot out of hand those they capture because of the breakdown of the ordinary functions of whatever courts existed in the areas where military clashes occur. The insurgents also may not wish to be burdened with captives, particularly wounded ones. They may hold persons favorable to the government as hostages, hoping in this way to influence the government's actions. Considering all these factors, plus the fact that many operations are carried out by small groups in remote areas where the normal restraints of law and civilization are little felt, it is small wonder violations have occurred. Yet, a reading of Article 3 certainly shows that the safeguards it offers are the absolute minimum for civilized conduct. There is no logical reason for the established government to lower its standards in fighting its own citizens.

Subparagraph (1)(d) of the Article does not prohibit punishment of the captured insurgent. It is only punishment without a proper trial that is prohibited.

The last paragraph of Article 3 provides that its application "shall not affect the legal status of the Parties to the conflict." This is particularly applicable to the status of the rebels. The established government will usually **look** upon them as "bandits," "terrorists," "murderers," and "traitors." These they well may be, but the application of the humane provisions of Article 3 to them will not bind the government to give them any status they do not already possess.

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"It was the intent of the drafters of the convention that insurgent groups be as bound by Art. 3 as the forces of the government (PICTET, COMMENTARY, *op. cit.* *supra* note 18, at 37). It may be wondered how insurgent groups could be bound when they never signed the convention and most likely were not even in existence when the government accepted the obligation of the convention. The answer lies partly in the fact that treaties bind States and not particular governments of those States. If an insurgent **group** fights for political reasons within a State there is no reason why such a group should not be bound by some of the obligations of that State.

<sup>24</sup>For examples of the technique of terror by insurgents see Ney, *Guerrilla War and Modern strategy*, ORBIS, (Spring 1958) p. 66, 74-77.

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Least of all, its application will not give them the status of belligerents entitled to all the rights of combatants in international wars.

The Algerian civil war of 1954-62 is one of the few conflicts where the applicability of Article 3 was extensively argued by the rebels. In 1960 a White Paper was published in New York by the Algerians.<sup>25</sup> They stated that one obstacle which paralyzed the employment of the Geneva Conventions in the conflict by the French was their fear of giving the F.L.N. an international status. Another purported reason was the absence of reciprocity with respect to the humanitarian rules on the part of the F.L.N.,<sup>26</sup> a reason which the F.L.N. disputed. The rebels also argued that the French exercised belligerent rights at sea against neutral shipping and even in the air against Tunisian aircraft, thereby, as in our Civil War, recognizing the belligerent status of the rebels.<sup>27</sup>

The experience in Algeria, and elsewhere in this century,<sup>28</sup> indicates that States are moving away from according an international legal status to rebels. It is therefore imperative that that portion of Article 3 which encourages Parties to apply the other provisions of the Convention be implemented. By the very wording of Article 3, as was indicated above, such implementation would not affect the legal status of the Parties, but would only impose upon them duties of a humanitarian character. The need for such agreements would be particularly compelling where a *de facto* belligerency existed.<sup>29</sup>

b. *The conduct of military operations.* There are extremely few rules of international law that are specifically applicable to the actual conduct of military operations in hostilities not of an international character. There is nothing comparable to Article 3. One of the few codified rules is Article 19 of the *Hague Convention of May 1954 on the Protection of Cultural Property in the Event of Armed Conflict*. It provides that those articles of the convention which relate to the respect for cultural property apply to armed conflicts not of an

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<sup>25</sup> *White Paper on the Application of the Geneva Conventions of 1949 to the Algerian Conflict* (New York: Algerian Office, May 1960).

<sup>26</sup> *Id.* at 13.

<sup>27</sup> *Ibid.* Ney, *supra* note 24, at 71, reports that In October 1956, a Greek ship carrying arms from Egypt, the *Athos*, was captured in Algerian waters. In January 1958, the Yugoslav cargo ship *Slovenija* was captured by French warships in international waters some fifty miles from Oran. She was reportedly carrying some 6,000 weapons and 95 tons of ammunition for delivery to agents of the Algerian rebel movement in Casablanca.

<sup>28</sup> Spanish (1936-38), Chinese (1947-49) and Indo Chinese (1952-54) conflicts are further examples of sizeable hostilities that escaped a recognition of belligerency.

<sup>29</sup> Where a *de facto* belligerency does not in fact exist, it may not be appropriate as a matter of policy, to enter into agreements which apply the entire convention. There are certain portions, as example that which has been interpreted to forbid a PW from serving in the armed forces of his captor (FM 27-10, para. 87), which may prevent the building of a truly national army in this time of internal crisis.

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international character.<sup>30</sup> This convention, therefore, follows the precedent set in the 1949 Geneva Conventions. The United States is not yet a party to this convention; however, several of the members of the North Atlantic Treaty Organization have ratified it.<sup>31</sup>

The international law of war was primarily designed to govern a contest between two armed forces which carry on the hostilities in a more or less open fashion. Analogously, the rules of football were designed to govern a contest between two uniformed teams, clearly distinguishable from the spectators. How well would those rules work, however, if one team were uniformed and on the field, the other hid itself among the spectators, and the spectators wandered freely over the playing field?

This analogy will assist in understanding the difficulty faced in applying the rules of war to insurgency warfare, particularly in undeveloped areas. The main distinction from conventional wars is that it is often impossible to distinguish the fighter from the peaceful citizen. The results of this distinction are many. *First*, the tactics of combat change. Ruses, surprises, and massacres of units of the regular uniformed force can be expected. It is as if the whole population were the "enemy."

*Second*, the regular forces habitually think in terms of "targets" and "objectives." The laws of war are designed to guide the soldier in his selection of legitimate targets. Operating against the insurgent, he sees no "target." Likewise, a hill is not an "objective" when no one is defending it. *Lastly*, the regular forces also habitually think in terms of the distinction between the soldier and civilian, a distinction resulting in different legal rights and duties. A communist insurgency movement attempts to erase this distinction. The point here is not the lack of a visible distinction, but the lack of a *real* distinction. The insurgent fighter not only hides among the civilian population, he also attempts to identify himself with it and to strike the regular

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<sup>30</sup> Art. 19. *Conflicts Not of an International Character*.

1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present convention which relate to respect for cultural property.

2. The parties to the conflict shall endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

3. The United Nations Educational, Scientific, and Cultural Organization may offer its services to the parties to the conflict.

4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

<sup>31</sup> France, Italy and the Netherlands. In addition all the members of the Warsaw Treaty, with the exception of Albania, have ratified this convention. Moritz, *The Common Application of the Laws of War Within the NATO Forces*, 13 MIL L. REV. 1, 22 (DA Pam. 27-100-13, 1 July 1961).

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army of the established government with the whole civilian population. It is not solely a matter of fighting through the civilian populations, or swimming in them as Mao's famous quote would indicate,<sup>32</sup> rather it is making them one with the fighter. This has been termed "Mass warfare"! by a Chinese Nationalist general in a recent issue of the *Military Review*.<sup>33</sup> The communist strategy did not make the time-honored distinction between combatant and non-combatant. "Mass warfare" field exercises by the communists took place almost as often as regular military maneuvers. In these maneuvers, the local populations played an active part in assisting the regular army. For instance, in 1948 at Sunchow, north of Nanking, thousands upon thousands of Chinese civilians dug thousands of trenches around nine Nationalist Corps, making utilization of the mechanized units extremely difficult. Some of these civilians came from as far away as 700 miles.<sup>34</sup>

The idea of mass warfare is again evident in the very title of the book by the Viet Cong General Giap, *People's War, People's Army; The Viet Cong Insurrection Manual for Underdeveloped Countries*.<sup>35</sup> Photos allegedly taken at Dien Bien Phu showed endless lines of civilians bringing supplies to the fighting men.<sup>36</sup>

This eradication of the distinction between civilian and soldier is evident again in the conflict now going on in Vietnam.<sup>37</sup>

The distinction between the combatant and noncombatant has implications throughout the law of war. Its roots go far back in customary international law.<sup>38</sup> It was noted in the St. Petersburg Declaration of 1868,<sup>39</sup> and is still reflected in the latest edition of FM 27-10.<sup>40</sup> This distinction has been under assault for several reasons, one of which is the nature of modern weapons, many of which are

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<sup>32</sup> "The people may be likened to water, the troops to the fish who inhabit it." MAO TSE-TUNG, *GUERRILLA WAR*.

<sup>33</sup> Major General Chou Shih-fou, Republic of China. *Mass Warfare*, *MILITARY REVIEW* 28 (Jan. 1963).

<sup>34</sup> *Id.* at 30.

<sup>35</sup> GIAP, *PEOPLE'S WAR, PEOPLE'S ARMY, THE VIET CONG INSURRECTION MANUAL FOR UNDERDEVELOPED COUNTRIES* (1962).

<sup>36</sup> *Ibid.* Plate at p. 176. See also the duties of noncombatants listed on p. 183.

<sup>37</sup> "Traditional rules of war have the civil populace mainly out of the military struggle. These rules are not in the Viet Cong catalog; this war is a struggle centered for and on the people. Every person in the Viet Cong is a fighter—but without uniform. Many VC carry weapons while others carry and gather food, supplies, and military intelligence." Rigg, *Catalog of Viet Cong Violence*, *MILITARY REVIEW* 23, 29 (Dec. 1962).

<sup>38</sup> HALL, *INTERNATIONAL LAW* 397 n. 1 (5th ed. 1904) contains an interesting history of the development of the legal distinction between combatants and noncombatants.

<sup>39</sup> This declaration states that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military force of the enemy."

<sup>40</sup> FM 2i-10. *op. cit. supra* note 5, para 25.

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"blind" in the sense that the person utilizing them does not see his targets. In addition, the economics of war require a "home front" to provide the weapons and industry for the armed forces.<sup>41</sup> These two factors have lessened the protection which can be afforded the noncombatant. The ideological factor in "people's wars" blurs this distinction even more. Consequently, a student of the law of war must be familiar with the philosophy of Giap, Mao, etc., because these men are altering one of the facts upon which the law of war was founded.

A second major distinction from conventional warfare is the apparent ruthlessness of the insurgent. General Hull, referring to Indian methods of warfare in our early history, stated "They respect no right and know no wrong."<sup>42</sup> Certain cautions are to be noted because of this second distinction. *First*, the regular force should not be shocked by what the insurgent does. For instance, in Greece the communist insurgents kidnapped thousands of children and sent them to neighboring communist countries for schooling. *Second*, such shock and anger on the part of the regular forces may tempt them to take "reprisals." The concept of "reprisal" has no part in such wars. It could only lower the standards of a civilized army.<sup>43</sup> For example, in the United States counterinsurgency operations in the Philippines in 1901, an American brigadier general was court-martialed and retired from the service for telling his troops, "I want no prisoners. The more you kill and burn, the better you will please me."<sup>44</sup> President Theodore Roosevelt, in approving the findings of this court-martial, made the following comments :

I am well aware of the danger and great difficulty of the tasks our Army has had in the Philippine Islands, and of the wellnigh intolerable provocation it has received from the cruelty, treachery, and total disregard of the rule? and customs of civilized warfare on the part of its foes. . . . But the very fact that warfare is of such character as to afford infinite provocation for the commission of act; of cruelty by junior officers and the enlisted men, must make the officers in high and responsible positions peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates.<sup>45</sup>

<sup>41</sup> See STONE, *LEGAL CONTROL OF INTERNATIONAL CONFLICT* 627-631 (1954), wherein the author discusses the sharp distinction between civilians of the traditional sort and civilians who constitute, under conditions of modern technological warfare, the workforce of the enemy.

<sup>42</sup> Quoted in Colby, *How to Fight Savage Tribes*, 21 AM. J. INT'L L. 277, 284-285 (1927).

<sup>43</sup> "... a self respecting commander will not follow the example of an antagonist, should that example unfortunately be set, in reducing a civilized army to the rank of a band of massacring savages." (BATES, *INTERNATIONAL LAW IN SOUTH AFRICA* 85-86, quoted in Colby, *supra* note 42, at 286.)

<sup>44</sup> VII MOORE, *DIGEST OF INTERNATIONAL LAW* 187 (1906).

<sup>45</sup> *Id.* at 188.

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This incident illustrates the use of U.S. military law as a controlling factor in counterinsurgency operations, which law can effectively reinforce the sparse international law in this area. However, the lack of international or even domestic law rules does not mean the lack of standards. The advice of Agamemnon to Pyrrhus in *The Trojan Women* still offers the professional soldier a guide: "What the law does not forbid, then let shame forbid."<sup>46</sup>

A practical example of this maxim would be the choice of weapons in conflict not subject to all the laws of war. There exists certain rules in international wars on the use of weapons. These rules cover such Weapons as barbed spears,<sup>47</sup> gas and germs,<sup>48</sup> the searing of the surface of a bullet<sup>49</sup> and the use of soft pellets which flatten when they strike a target.<sup>50</sup> In certain counterinsurgency operations, the bow and arrow and the shotgun may be useful weapons.<sup>51</sup> If these operations were conducted as part of an international conflict, the use of the barbed arrow or the use of a shotgun loaded with a soft lead shot would most likely be forbidden.<sup>52</sup> They are forbidden because it has been determined that they cause greater suffering on the part of the victim that is necessary to put him out of the fight. Even though these prohibitions were traditionally designed for conflicts between States, the reason behind them would apply equally to insurgency type civil wars. That reason is the lack of a necessity for them. It is in these areas that law is being made, and made it will be if counterinsurgency is a protracted program. The American Army will shape the law in this area, whether it means to or not, for

<sup>46</sup> Quoted with approval in III GROTIUS, *THE LAW OF WAR AND PEACE*, ch. I, (1642).

<sup>47</sup> FM 27-10, *op. cit. supra* note 5, at para. 34, interpreting Art. 23e of the Hague Regulations of 1907.

<sup>48</sup> Geneva Protocol prohibiting the use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (III HUDSON, *INTERNATIONAL LEGISLATION 1670-1672*). The United States is not a party to this protocol.

<sup>49</sup> FM 27-10, *op. cit. supra* note 5, at para. 34.

<sup>50</sup> This was the principal objection to unjacketed lead bullets and to the dum dum bullet, both being prohibited by the Hague Declaration of 1899 (SCOTT, *THE HAGUE CONVENTION AND DECLARATIONS OF 1899 AND 1907* (3d ed. 1918)). The advantage of such bullets was that they were thought to be effective in stopping an opponent who specialized in short, quick rushes, particularly from ambush. For a legal consideration of their use in the Somaliland in 1903 see T. E. HOLLAND, *LETTERS ON WAR AND NEUTRALITY* 53-66 (1909).

<sup>51</sup> For example the Director of Intelligence and Research has reported that even crossbows with poison arrows have been captured from the Viet Cong. 47 DEP'T STATE BULL. 530 (1962). The United States Army has itself developed a modern crossbow for jungle fighting. This weapon fires a steel-tipped arrow, lethal at 160 yards. Photograph of General C. V. Clifton showing such weapon to President Kennedy appeared in the Washington Post, April 7, 1963, at p. 6 of *Parade*.

<sup>52</sup> As to shotguns see Opinions of the Office of the Judge Advocate General, JAGW 1960/1305 (January 4, 1961) and JAGW 1961/1210 (September 1, 1961).

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it is what the United States Army does today which will determine, to a great extent, the law 30 or 40 years from now.

### III. LEGAL STATUS OF PARTICIPANTS IN INSURGENCY AND COUNTERINSURGENCY OPERATIONS

The participants in internal civil wars of the insurgency type are varied. They consist of the insurgent fighter himself, the passive bystander sympathetic to him, government police units, government armed forces, paramilitary civilian units organized to assist the government, foreign volunteers, and members of foreign armies sent to aid both the insurgents and the harassed government. These participants may have varying legal statuses depending on what relationship is being defined. For example, the legal relationship between the foreign soldier and the government he assists differs from the legal relationship between the foreign soldier and his own government, and between the foreign soldier and the insurgent he is fighting. The examination of these various statuses will begin with the individual who has created the problem in the first place—the insurgent himself.

#### A. *THE INSURGENT NOT IN UNIFORM*

This participant is usually looked upon by the government as an ordinary criminal,<sup>53</sup> because the local law of a state is applicable to most acts which take place within that state. If a policeman, political official or a soldier is attacked by an armed individual, that individual is subject to prosecution. The motive for his act is usually not relevant. For example, the assassination attempt in 1951 by a small group of Puerto Ricans against President Truman was inspired by political motives, not from the desire to rob or for the personal gain of the plotters. Those implicated were tried and sentenced by a regular court dispensing criminal laws then in effect in Washington, D.C. Multiply this incident a thousand times and the situation approaches a condition of insurgency. The local law against assault, murder, sedition, theft, etc., is still applicable. In this regard Secretary of State Stimson, on April 16, 1929, made the following observation:

While the United States has recognized the existence of a condition of hostilities in certain areas of Mexico . . . the belligerency of the rebels has not been recognized . . . nor has this Government recognized in this conflict even a semi-belligerency. . . . The rebels, therefore, have no

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<sup>53</sup> PICTET, COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 28 (1960). Some states have special criminal laws punishing those who engage in insurrection. For example, Arts. 73 to 76 of the Japanese Criminal Code are entitled "Crimes Relating to Civil War." The leader may be punished by death, the rest by 1 to 10 years' imprisonment.



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international legal status. . . . They are from the standpoint of legal principle, both international and national, in no better position than ordinary outlaws and **bandits**.<sup>54</sup>

The only difference now, from the standpoint of legal principle, is that they have the basic humanitarian protection of Article 3 of the **1949 Geneva Conventions**, whereas an ordinary criminal does not. There are, however, many differences stemming from the factual and policy considerations which prevent a literal application of the local law to insurgents.

From the factual standpoint the chase and capture of the insurgent more closely resembles operations in time of war against an enemy than it does the capture of a criminal. Article 3, consequently, gives the insurgent all the protection usually afforded criminals in the hands of police, plus some of the protection afforded prisoners of war. For instance, when police capture a suspected criminal it is well understood that they must turn him over for trial, because the power of punishment is not in their hands. Similarly, in wartime a *commander* may not put his prisoners of war to death, even where their presence retards his movements. It is likewise unlawful for him to kill his prisoners on the grounds of self-preservation even in the case of airborne or commando operations.<sup>55</sup> In counter-insurgency operations the same rule applies. Article 3 forbids the execution of captured insurgents at any time and in any place whatsoever without previous judgment pronounced by a regularly constituted court.

National policy considerations often force the government to soften its view of the insurgent as an ordinary criminal. In order to placate the insurgent groups the government may find it wise not to hold each individual accountable for a violation of the law. A recent article entitled "Psywar: The Lessons from Algeria," appearing in the *Military Review*,<sup>56</sup> made the following observation:

Rebels must be given a chance to surrender. In principle, those who surrender should be given a chance to prove their Sincerity—preferably **by** participating immediately in operations against their former **comrades**.<sup>57</sup> An exception should be made, of course, for those responsible for crimes.<sup>58</sup>

In Malaya such a program had remarkably good results. A strong propaganda campaign was launched which offered the rebels the choice

<sup>54</sup> Quoted in I HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 325 (1949).

<sup>55</sup> Para. 85, FM 27-10, *op. cit. supra* note 5.

<sup>56</sup> Bjilajoc, *Psywar: The Lessons from Algeria*, *MILITARY REVIEW* 2, 6 (Dec. 1962).

<sup>57</sup> "This practice would certainly be unlawful if all the PW convention were applicable to the conflict because of the restrictions of Art. 7 GPW.

<sup>58</sup> There is precedent for this leniency in our own history. President Lincoln refused to prosecute any Indian, who during the Indian uprisings in Minnesota in 1862, killed a Union soldier in combat. However, those who harmed helpless citizens were tried. Andrist, *Massacre*, *AMERICAN HERITAGE* 8, 111 (April 1962).

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between death in the jungle, and protection and rehabilitation for those who surrendered.<sup>59</sup> More recently in January 1963, in the Congo fighting, a general amnesty was granted to those in Katanga who opposed the authority of the Central Government.

The very fact that a government may try a guerrilla, even under Article 3, gives it a powerful propaganda weapon when it offers to forgo such trials if the insurgent will surrender.

### B. THE INSURGENT IN UNIFORM

The implications of the wearing of the uniform are many. From a legal viewpoint the uniform is important if the rebels have been recognized as belligerents. Such recognition, as was mentioned in Part II, *supra*, causes international rules to be applicable to the conflict. International law, as a result, superimposes itself on the local law to make permissible, as lawful belligerent rights, some conduct which otherwise would be criminal.<sup>60</sup> It would also be important if there was an agreement to apply some or all of the remaining articles of the Convention to the hostilities. In such an event the wearing of the uniform would be a key factor in determining if the requirements of Article 4 have been met.<sup>61</sup>

From a policy standpoint the rebel in uniform is likely to be less of a terrorist and more of a fighter, thereby encouraging a policy of leniency toward him on the part of the government. For example, the United States forces operating against insurgents in the Philippines in 1901 were reported to have generally accorded PW status to those, captives who met the uniform requirements of the 1899 Hage Convention.<sup>62</sup> Still, it cannot be said that, in the absence of a status of belligerency, the rebels could demand as a matter of right to be treated as prisoners of war merely because they wore a uniform.<sup>63</sup> This was

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<sup>59</sup> U.S. DEP'T OF ARMY PAMPHLET 355-139, **ALERT SO. G, THE THIRD CHALLENGE, UNCONVENTIONAL WARFARE 9** (1962).

<sup>60</sup> For example, it would be unrealistic to say that the Pennsylvania law against murder forbade General Lee's attack on the Union forces at Gettysburg. It is possible, however, that even in a belligerency some of the leaders of the revolt may be charged with treason once the conflict is over.

<sup>61</sup> Art. 4 restates the traditional requirements for those who, as a matter of right, are entitled to PW status when captured. They are: (1) that of being commanded by a person responsible for his subordinates; (2) that of having a fixed distinction sign recognizable at a distance; (3) that of carrying arms openly; and (4) that of conducting operations in accordance with the laws and customs of war.

<sup>62</sup> Discussed in Special Operations Office of the American University, *The Legal Status of Participants in Unconventional Warfare* 17 (Dec. 1961).

<sup>63</sup> Some writers have maintained that the laws of war apply to the relationship between the government and armed forces of the insurgent. For instance in 1922 Wilson and Tucker made the following statement: "When insurgency exists, the armed forces of the insurgent must observe and are entitled to other ad-

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illustrated in Algeria where revolutionaries captured in uniform were sentenced to penitentiaries along with other law violators.<sup>64</sup>

### C. PRIVATE FOREIGNERS ASSISTING THE INSURGENTS

Foreigners, acting in their private capacities, are often attracted to the insurgent's cause for a number of reasons. They need be treated no differently from the national insurgent when captured.<sup>65</sup> Foreign personnel who aid insurgents share their lot. Unless their country is at war with the local government, they cannot claim any special status when they exercise belligerent rights on that government's soil in a civil war of the insurgency type. A celebrated example of harsh treatment meted out to foreigners assisting insurgents was that of the *Virginius*. The *Virginius* was a ship which left New York in 1873 carrying a group of volunteers to fight with the insurgents in Cuba. On October 31, 1873, it was captured on the high seas by the Spanish cruiser *Tornado* and taken to Santiago de Cuba. There, fifty-three of the persons on board, American, British and Cuban, were charged with piracy, tried by court-martial and shot.<sup>66</sup>

There is nothing to prevent the State of which such foreign personnel are nationals from requesting special treatment for them. Domestic policy reasons may cause a government to treat local insurgents with leniency. Likewise, foreign policy reasons may alter its attitude toward foreigners captured while assisting the insurgents. For example, the United States requested the following treatment for American volunteers serving with rebel forces in Mexico in 1929:

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vantages of the laws of war in their relations to the parent state." WILSON AND TUCKER, *op. cit. supra* note 13, at 64. Neither custom nor treaty is cited in support of this statement. The single citation to LAWRENCE, *INTERNATIONAL LAW*, para. 142 (4th ed. 1910), is not in point. The debates preceding the adoption of Art. 3 in 1949 indicated that governments do not consider themselves so bound in law.

<sup>64</sup> *White Paper on the Application of the Geneva Conventions of 1949 to the French Algerian Conflict* (New York: Algerian Office, 1960). Yet, if the right of political revolt is recognized, humanitarian principles would seem to demand that those who are in an army seeking to change the form of government be treated as PW's when captured, even where belligerency does not exist. Powers, *Insurgency and the Law of Nations*, 16 JAG J. 55, 57 (May 1962). Nevertheless, it cannot be said that this principle is at present a part of international law. LAUTERPACHT, *op. cit. supra* note 4, at 252.

<sup>65</sup> Equal treatment is, of course, not a substitute for the minimum standards which international law requires for the treatment of aliens. *U.S. Foreign Relations* 786 (1918). Art. 3 now gives an international minimum standard of conduct for alien and national alike in "conflicts not of an international character."

<sup>66</sup> For an account of the incident see I HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 244-5 (1945); and II MOORE, *DIGEST OF INTERNATIONAL LAW* 895 (1906).

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The Government of the United States will expect that such Americans when taken prisoner will not be regarded by the Government of Mexico as guilty of treason but, on the contrary, that any American fighting in the rebel army will, if taken prisoner, be treated by the regular Government forces in accordance with the laws of war as recognized between nations, and not in accordance with domestic law when the latter differs from such laws of war. You are instructed further to say that this is not intended to involve, even by implication, a recognition of the belligerency of the rebel forces, the sole purpose and desire of the Government of the United States being to avoid a distressing and unfortunate accident or incident which might prove most embarrassing to both Governments.<sup>67</sup>

This position of the United States is not at variance with what has been discussed so far. Both international law and domestic law often represent the minimum conduct acceptable to civilized standards. There is nothing in either which would prevent better treatment of those involved in a civil war.<sup>68</sup>

### D. MEMBERS OF A FOREIGN MILITARY FORCE HELPING THE INSURGENTS

Members of a foreign military force may sometimes be sent by their government to assist the insurgents as advisors and instructors, or even as direct combatants. The question of their status in relation to the local government raises certain fundamental issues which are not easily resolved.

There are two possible approaches to a solution to this situation: future State practice alone will tell which is correct. One approach would conclude that the same reasoning applies as was discussed in subparagraph C, *supra*. Neither the duly established government nor the foreign State to whom the troops belong consider themselves at war with one another: therefore, the established government is not bound to give PW status to the military personnel of such a foreign State who are advising and assisting the insurgents. It is possible that an international war may develop between the two States because of the presence of the foreign forces. If it does, then such foreign forces captured are entitled to PW status.

The other approach would reach an opposite conclusion, reasoning that the 1949 Prisoners of War Convention is designed to protect

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<sup>67</sup> HACKWORTH, DIGEST OF INTERNATIONAL LAW 324 (1941). The United States has not always requested such special treatment for American citizens who are captured while assisting insurgents. For example, the U.S. demanded only a fair trial for Americans involved in revolutionary movements in Mexico in 1912 and in Greece in 1935. *Id.* at 326, and II *Id.* at 84.

<sup>68</sup> For example, Art. 3 of the four 1949 Geneva Conventions, besides urging that each side to an armed conflict not of an international character apply part or the entire convention, states that the provisions of Article 3 are a minimum required for civilized conduct.

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soldiers in armed conflicts of an international character. Such a conflict exists whenever any difference arising between two States leads to the intervention of members of the armed forces. Whether both States wish to regard it as war is one thing; whether the protection of the Prisoners of War Convention applies is quite another, because the Prisoners of War Convention was designed to protect individuals and not to serve the political interests of States.<sup>69</sup> Therefore, whether such a foreign soldier should be in the territory of the established government is a question between the established government and the foreign State who sent him, not between the established government and the individual foreign soldier.<sup>70</sup>

The relationship between governments is not as open to doubt as the relationship of the dispatched soldier to the foreign government which captures him. Aid to insurgent forces has been considered intervention and as such violates the political independence of the State against which it is practiced.<sup>71</sup> It does much more if such intervention is part of a global plan of subversion. By provoking countermeasures against the intervening State by the established government and by allies of the established government,<sup>72</sup> it creates a grave threat to the peace. President Kennedy made this clear when he cautioned Premier Khrushchev at Vienna in 1961 that there cannot be too many "wars of liberation" without a direct confrontation of United States and Soviet power.

The United Nations is aware of grave international consequences of foreign involvement with insurgency movements. On November 17, 1950, the General Assembly passed the following resolution: "Whatever the weapons used, any aggression whether committed openly or by fomenting strife in the interest of a foreign power, is the gravest of all crimes against peace and security throughout the world."<sup>73</sup>

<sup>69</sup> PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (1960).

<sup>70</sup> Special Operations Research Officer of the American University, Washington, D.C., *The Legal Status of Participants in Unconventional Warfare* 7 (Oct. 1961). An example of international protection afforded foreign troops present on U.S. soil without U.S. permission occurred in Texas in 1916. Certain Mexican soldiers engaged in skirmishes on the U.S. side of the border as a result of which some American soldiers were killed. A Texas court tried them for murder and sentenced them to death. The Texas Court of Criminal Appeals reversed the conviction on several grounds, one of which was that, if at the time a state of actual war existed between the United States and Mexico, the question of the defendants' guilt was an international not a state matter. II HACKWORTH, DIGEST OF INTERNATIONAL LAW 406 (1941).

<sup>71</sup> LAUTERPACHT, *Op. cit. supra* note 4, at 660.

<sup>72</sup> Cited in Wright, *United States intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 123 (1959).

<sup>73</sup> For example see *A Threat to the Peace: North Viet-Nam's Effort to Conquer South Viet-Nam* (Wash: U.S. Gov. Printing OFF., 1961).

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The awareness by the United Nations in 1950 has not solved this serious problem, however. Eight years later, Ambassador Lodge could still say: "If the United Nations cannot deal with indirect aggression, the United Nations will break up."<sup>74</sup>

It is this foreign aid to insurgency movements that has changed the character of domestic conflicts and transformed them into international civil wars, a description which, by the very paradox of its wording, accurately describes the forces that are at work in modern insurgency movements.<sup>75</sup>

Sigmund Neumann has described accurately the present state of things when he wrote back in 1949, that :

In the age of the international civil war it is not always necessary to move armies across national frontiers in order to win major battles. A central revolutionary authority, enforced by the new weapons of psychological warfare, can direct its orders by remote control through the well-established revolutionary pipelines of the disciplined party within the border . . . (the hero or villain who suddenly determines the fate of a nation) is not the pattern of the twentieth century revolution. It is totalitarian and institutionalized, operating from a powerful mass basis and militantly organized to play its role in the international civil war.<sup>76</sup>

One manifestation of this manipulation from without of insurgent forces within is the utilization of armed bands which infiltrate across the border and act as cadres for the local insurgent forces.<sup>77</sup>

This pattern of subversion through civil wars, which is the latest effort at expansion by international communism, has naturally triggered a reaction on the part of the United States. The response to the international civil war is counterinsurgency. This response brings with it the involvement of American forces on the side of established governments.

### E. MEMBERS OF A FOREIGN MILITARY FORCE HELPING THE ESTABLISHED GOVERNMENT

The relationship between these participants and the local government is usually established by treaty. A treaty is necessary because

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<sup>74</sup> Reported in 39 DEP'T STATE BULL. 195 (1958).

<sup>75</sup> See Neumann, "The International Civil War," 1 *World Politics* 333 (1949) for an excellent analysis of the place of civil war in post World War II international relations. He has anticipated the need for counterinsurgency by at least a decade. For a more current account of revolutions see CROZIER, *THE REBELS: A STUDY OF POST-WAR INSURRECTIONS* (1960).

<sup>76</sup> Neumann, *supra* note 75, at 349-350.

<sup>77</sup> See Brownlie, *International Law and the Activities of Armed Bands*, 7 *IST'L & COMP. L. Q.* 712-735 (1958) for a comprehensive treatment of the utilization of armed bands since 1943. More recent examples since the publication of this article have been the infiltrations of up to 16,000 North Vietnamese troops into the Republic of Vietnam. CLUBB, *THE UNITED STATES AND THE SINO-SOVIET BLOC IN SOUTHEAST ASIA* 44 (1962), citing the New York Times of April 28, 1962.

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in its absence, the local law applies to these foreign forces in the same manner as it applies to the insurgent and those helping him. The mere invitation of the established government to enter its territory does not relieve such forces of the application of the local law. For example, the United States troops which moved into Thailand hurriedly in the spring of 1962 have as yet (April 1963) no such agreement exempting them from the local criminal law.<sup>78</sup> In contrast, all the American forces in Vietnam are covered by the 1950 **MAAG Agreement**<sup>79</sup> which provides as follows :

The personnel will be divided into **3** categories :

(a) Upon appropriate notification of the other, full diplomatic status will be granted to the senior military member and the senior Army, Navy and Air Force officer assigned thereto, and to their respective immediate deputies.

(b) The second category **of** personnel will enjoy privileges and immunities conferred by international custom, as recognized by each Government, to certain categories of personnel of the Diplomatic Mission of the other, such as the immunity from civil and criminal jurisdiction **of** the host country, immunity of official papers from search and seizure, right of free egress, exemption from customs duties or similar taxes or restrictions in respect **of** personally owned property imported into the host country by such personnel for their personal use and consumption, without prejudice to the existing regulations on foreign exchange, exemption from internal taxation by the host country upon salaries of such personnel. Privileges **and** courtesies incident to diplomatic status such as diplomatic automobile license plates, inclusion on the "Diplomatic List," and social courtesies **may** be waived by both Governments for this category of personnel.

(c) The third category of personnel will receive the same status as the clerical personnel **of** the Diplomatic Mission.

**It** is always emphasized that these foreign troops are there to advise and assist the local government, rather than to command or to operate independently. **It** is the established government's responsibility and right to manage its own affairs. As the government of a sovereign State, it is supreme within its own borders. Foreign military advisors may not like or agree with its strategy; still they can only advise and persuade. If they were to have an authoritative role in the internal conflict, the agreement under which they entered would have to be substantially revised,

Though the relationship of the foreign forces with the established government may be clearly defined by treaty, the action of the foreign government in sending such forces, even on invitation, is sometimes questioned on the ground that assistance to an established govern-

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<sup>78</sup>There is a MAAG type agreement with Thailand (3 U.S.T. & O.I.A. 2675, Oct. 17, 1950. TIAS *So.* 2434). However, it is not applicable to the U.S. troops who entered the country in the 1961 emergency.

<sup>79</sup>Mutual Defense Assistance Agreement—Viet-Nam, December 23, 1950, 3 U.S.T. & O.I.A. 2756.

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ment in a civil war is as much intervention as is assistance to the revolutionaries. As late as 1960 one writer stated, "Since international law recognizes the right of revolution, it cannot permit other states to intervene to prevent it."<sup>80</sup> Such objections cannot be lightly dismissed since every school boy knows that our nation owes its existence to a revolution and that our political philosophy is based on the belief that governments derive their power to govern from the consent of the governed. However, the objection, though relevant to civil wars in the traditional sense, loses its validity when applied to civil wars inspired or directed by outside agencies.<sup>81</sup> The latter is an international civil war posing in its subversion of governments, a far greater threat to the freedom of the people of those countries and to the security of the United States than did the Holy Alliance to the Americans in the last century.<sup>82</sup> It is this distinction in fact<sup>83</sup> which makes for the distinction in law.<sup>84</sup>

<sup>80</sup> Wright, *Subversive Intervention*, 54 AM. J. INT'L L. 521, 529 (July 1960). See also WEHBERG, CIVIL WAR AND INTERNATIONAL LAW IN THE WORLD CRISIS 181 (1938), wherein this leading German authority stated: "As the legitimate Government is the only one with which foreign powers can deal, it might be assumed that there was no reason why foreign powers should not grant them any support they desire by the supply of weapons, by means of loans, etc. . . . This view quite overlooks the fact that according to international law, civil war is entirely permissible and that to side with the legitimate Government involves intervention in the internal affairs of that State."

<sup>81</sup> "The Communists try to maintain the fiction that this is a civil war arising spontaneously from within South Viet-Nam. This is not true. The Communists in South Viet-Nam are directing this guerrilla movement. For years they have been sending in trained men to be the cadre for the Communist Viet Cong battalions. . . . The guerrilla movement in South Viet-Nam is directed from outside by an enemy nation. It is interference by military force in the affairs of another nation." Hilsman, *A Report on South Viet-Nam*, 47 DEPT STATE BULL. 526, 530 (Oct. 8, 1962).

"The Monroe Doctrine of Dec. 2, 1823, was prompted partially by the fear that, by intervention, certain European powers would undermine the political independence of the new republics of Latin America. Monroe's message indicates that such intervention would not only be contrary to the wish of the new nations themselves but would also endanger international peace. "It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness: nor can we believe that our southern brethren, if left to themselves, would adopt it of their own accord."

<sup>83</sup> President Truman, in announcing the Truman Doctrine, stated the policy that has guided the United States for the past 16 years. "I believe that it must be the policy of the United States to support peoples who are resisting attempted subjugation by armed minorities or by outside pressure." (Address to Joint Session of Congress, 19 Mar. 1947, concerning aid to Greece and Turkey.) President Eisenhower implemented this policy in Lebanon in 1958. He gave as partial justification for U.S. assistance the following: "The insurrection (in Lebanon) was further supported by sizable amounts of arms, ammunition, money and by personnel infiltrated from Syria to fight against the lawful authorities." (39 DEPT STATE BULL. 182 (Aug. 4, 1938).)

<sup>84</sup> Admiral Powers, the Assistant Judge Advocate General of Navy, in an ad-



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### F. PERSONS CAPTURED BY INSURGENTS

It is inevitable that some persons engaged in counterinsurgency activities will be captured by the insurgents. The application of Article 3 of the 1949 Conventions to captured insurgents was discussed in subparagraph A, *supra*. Persons captured by the insurgents are also protected by Article 3. Article 3 binds the insurgents in their treatment of captives as well as it binds the government, because they also are a "Party to the conflict."<sup>85</sup>

The one difference in the application of Article 3 by insurgents and governments is that there appears to be no lawful way an insurgent group can try those it captures, or in any way subject prisoners to judicial punishment as the government can. This group has no authority under international law or under the local national law to convene courts. This, of course, will not, and does not stop them from trying people, particularly their own in order to maintain internal discipline, and prisoners in some cases. This is particularly true when the insurgency has reached the stage of *de facto* belligerency. If the insurgent is successful and takes over the government, he possesses all the judicial authority of any government. He could, therefore, try the ex-government officials for the conduct of their counterinsurgency operation. This is just what Castro did after victory in Cuba. He called the trials "war crimes trials." It is to be regretted that these trials turned out to be political purge trials<sup>86</sup> rather than trials for the violation of activities prohibited by Article 3.

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dress in May 1962 before the American Society of International Law, analyzed the United States legal position toward civil wars as follows:

The position of the United States regarding Cuba in 1958 and 1959 is considered to be a proper determination of the questions under both the Charter of the Organizations of American States and the principle of International Law. This principle is that aid to the established government during insurgency or rebellion is legal, prior to a recognition of belligerency, and unless limited by a treaty or agreement. Aid to insurgents or rebels is not legal and constitutes intervention. After recognition of belligerency, aid to either side is a deviation from neutrality.

"Problems of Insurgency in International Law," an address by Rear Admiral Robert D. Powers, Jr., USN, before the American Society of International Law, April 26, 1962, at Washington, D.C. Reproduced in article form in 16 JAG J., *supra* note 64, at 63.

<sup>85</sup> PICTET, COMMENTARY ON THE IV GENEVA CONVENTION 37 (1958). It may be wondered how insurgent groups could be so bound when they never signed the convention and most likely were not even in existence when the government accepted the obligation of the convention. The answer lies partly in the fact that treaties bind States and in some cases people within those States, and not merely particular governments of those States. If an insurgent group fights for political reasons within a State, there is little reason why such a group should not be bound by some of the obligations of that State.

<sup>86</sup> See CUBA AND THE RULE OF LAW 152-180 (Geneva: International Commission of Jurists, 1962) for an account of some of these trials.

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Article 3 may be scant comfort to an individual captured by insurgents. Many times the insurgents would not even have heard of it. The treatment of captives appears *to* be influenced more by policy than by purely legal considerations. For example, the insurgents in Algeria at times afforded protections far beyond Article 3 in order to substantiate their claim to a status of belligerency.<sup>87</sup> There is also indication that the French captured at Dien Bien Phu were afforded prisoners of war status by the rebels, who looked upon themselves as the legitimate government and the forces they opposed as the usurpers.<sup>88</sup> Che Guevara, in his book, *La Guerra De Guerrillas*,<sup>89</sup> emphasized that most low-ranking captives were well treated after the errors of their ways were pointed out to them. These generally were enlightened viewpoints of rebels who feel confident of their powers.

It must be pointed out that foreign military personnel who assist the established government in its counterinsurgency operations have a legal status no different from anyone else captured by the insurgent. This is true whether they wear the uniform of the foreign government they are helping, their own uniform, or civilian clothes. The protection afforded by Article 3 does not depend on the uniform or lack of uniform worn by the captive. If, as mentioned in subparagraph B, *supra*, additional articles of the Prisoners of War Convention are introduced into the fighting by agreement, then the wearing of a uniform becomes very important because a status very similar to that of a prisoner of war would belong to individuals captured in uniform.

### G. THE AMERICAN SOLDIER AND HIS OWN GOVERNMENT

The relationship between the foreign soldier, particularly the American soldier, and the established government he is assisting was explored in subparagraph E, *supra*. The legal relationship between the American soldier and his own government is governed by federal law rather than by treaty. For example, the criminal provisions of the Uniform Code of Military Justice are applicable to the United States serviceman whether he is within or without the United States.<sup>90</sup> This is unusual because most of our criminal laws apply only to acts com-

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<sup>87</sup> *White Paper on the Application of the Geneva Conventions of 1949 to the Algerian Conflict* (New York: Algerian Office, May 1960).

<sup>88</sup> According to the North Vietnam revolutionaries the Democratic Republic of Vietnam was successfully founded in August 1945. Immediately after this the French invaded the country and sought to overthrow the republic (Giap, *op. cit. supra* note 35, at p. 88, and 216).

<sup>89</sup> Translated and reprinted in the March, April, and May 1961 issues of *Army*.

<sup>90</sup> Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Re-enacted in 1956 as 10 U.S.C. §§ 801-940 (1958) (hereinafter cited as UCMJ, art. —). Article 5 states: "The code shall be applicable in all places."

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mitted in the United States. The Uniform Code has another unusual feature, which permits *any* court-martial to try a *serviceman* for any offense prohibited by the code.<sup>91</sup> For example, if a member of a small isolated unit in Vietnam commits an offense and is later transferred to a division in Germany, the Commanding General of that division *can* convene a court-martial to try the offender.

The Uniform Code covers not only the non-combat phase of a soldiers' life but also periods of combat and while a prisoner of war. Both of these latter periods raise new and interesting questions in counterinsurgency operations. Suppose, for example, an American soldier shamefully runs away when the unit he is with engages the insurgents. Could he be guilty of "misbehavior before the enemy under Article 99, UCMJ?"<sup>92</sup> There has been no clear, judicial answer to this question. The difficulty in counterinsurgency is that there is no "enemy" of the United States in the usual sense before which a person may misbehave. The *Manual for Courts-Martial* is of some assistance. It construes the term "enemy" in Article 99 to include not only organized forces of the enemy in time of war but also any hostile body United States troops may be opposing, such as a rebellious mob or a band of renegades.<sup>93</sup> No judicial decisions have been found, however, extending the term "enemy" to foreign insurgents.

Turning to the period of captivity by insurgents, other problems are encountered. Article 105, UCMJ, prohibits misconduct as a prisoner of war.<sup>94</sup> It is doubtful that Article 105 applies, because American soldiers captured by insurgents are not prisoners of war in the strict sense. Also, the counterinsurgency operation is not "in time of war," a time requirement not contained in Article 99.

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<sup>91</sup> UCMJ, arts. 17 and 18.

<sup>92</sup> UCMJ, art. 99: "Any member of the armed forces who before or in the presence of the enemy—

(1) runs away; or

(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;

(3) is guilty of cowardly conduct

....

shall be punished by death or such other punishment as a court-martial may direct."

<sup>93</sup> U.S. DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, para. 178a.

<sup>94</sup> UCMJ, art. 105: "Any person subject to this code who, while in the hands of the enemy in time of war—

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct."

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If Article 105 is not applicable, however, there is no reason why the Code of Conduct should not apply. It lays down standards of conduct, which, though not setting a penal standard,<sup>95</sup> nevertheless establish a high professional standard.<sup>96</sup>

These two articles of the Uniform Code illustrate a fundamental difficulty that is encountered any time traditional rules are applied to these "twilight" wars. It can be seen by the fact that, although only Congress has the authority to declare war,<sup>97</sup> American soldiers are currently engaged in combat without such a declaration of war. It can be seen also in the United Nations Charter where indirect aggression has taken the place of direct aggression, and small aggressions the stage previously occupied by large aggressions. The difficulty for the rulemaker is that war refuses to stay within either a factual or a legal frame. It would be convenient to say that the old law covers these new areas; it would be desirable if it did, but practice has shown that it often does not. Law by analogy is unsatisfactory. Rules must be constantly revised; the rulemaker cannot rest secure in the thought that old rules apply to new facts.

### H. PRIVATE INDIVIDUALS WHO LAUNCH INSURGENCY MOVEMENTS FROM ABROAD

In this period of international civil wars the insurgents may be successful in their seizure of control of a State. Persons antagonistic to them may flee the country and attempt to oust them by launching expeditions from abroad. Under the law of the country they are operating against, they are criminals. Their position is no different from that of the insurgents discussed in subparagraphs A and B, *supra*. The fact that they come from outside the borders makes little difference as far as the applicability of the local law is concerned.

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"Opinions of The Judge Advocate General of the Army: JAGJ 1960/8387 (May 18, 1960); JAGJ 1961/8391 (May 15, 1961); JAGW 1961/1140 (June 23, 1961).

"An interesting incident under the Code of Conduct occurred in the spring of 1962 when two American servicemen were alleged to have given their "parole" to the Viet Cong insurgents who had captured them. Extensive debriefing of the servicemen by the United States Army, however, failed to indicate any substance to this allegation of the Viet Cong.

Art. III of the Code of Conduct forbids an American serviceman to give his parole and would appear to apply to captivity in any type warfare. If it were an international conflict or if the remainder of the 1949 PW Convention were by agreement applicable to insurgency warfare, international law and U.S. policy would govern parole. U.S. DEP'T OF ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956), para. 181, states a long standing U.S. policy which permits parole in only very limited circumstances. Art. 21 of the 1949 PW Conventions requires that such policy be communicated to the enemy in order to be binding upon its granting of parole to prisoners.

<sup>97</sup> U.S. CONST. art. I, § 8.

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The Bay of Pigs invaders were tried under local Cuban criminal

If the expedition is formed on United States soil it may also violate United States law. Section 960 of title 18, U.S.C., is designed to protect foreign governments from hostile expeditions formed on United States territory. An international conflict need not be in progress **for** such law to take effect; therefore, it is applicable to civil wars of the insurgency type.<sup>99</sup> It reads as follows :

Whoever, within the United States, knowingly begins **or** sets on foot **or** provides **or** prepares a means for or furnishes the money for, or **takes part** in, any military or naval expedition or enterprise to be carried on from there against the territory or dominion of any foreign prince or state, **or** of any colony, district, or people with whom the United States is at **peace**, shall be fined not more than \$3,000 or imprisoned not more than three years, **or** both.

This statute does not forbid Americans from going overseas as individuals to join insurgency movements.<sup>100</sup> Such individual action is not in the nature of an expedition carried on from the United States. An actual example of a violation occurred in 1916 when a group formed in the United States for the purpose of crossing into Canada to blow up the Welland Canal.<sup>101</sup> These armed bands coming from neighboring States are a problem of major importance in counter-insurgency.<sup>102</sup> Domestic laws such as 18 U.S.C. § 960 are necessary to control them.

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<sup>99</sup> In regard to the trial of the Bay of Pigs invaders **by** Castro, the International Committee of the Red Cross has made the following observation :

The Geneva Conventions having been invoked in numerous requests for intervention received by the International Committee of the Red Cross concerning the recent trial of Cuban prisoners captured during the invasion attempt in April 1961, it is appropriate to make the following statement :

In an international war, that is to say, in a war between States, a soldier cannot be punished for acts of legitimate warfare which he has committed against the enemy armed forces. If he is captured, he cannot be arraigned for such acts nor **be** prosecuted by a court. He has the right of the full application of the Third Convention of 1949, relative to the treatment of prisoners of war. On the other hand, in internal armed conflicts, namely those in which nationals of the same State oppose each other, only Article 3 of the Geneva Convention of 1949 is applicable. . . . The Diplomatic Conference of 1949, which drew up the text of this article, did not accept the addition of a provision granting impunity to insurgents taken with arms in their hands and who have committed no other crime than that of fighting openly against the armed forces of the Government. It cannot therefore be excluded that, in international law, captured members of armed insurgent forces be brought before the courts and tried, subject to the conditions laid down at (d) of that article.

INT'L REV. OF THE RED CROSS 271-2 (May 1962).

<sup>99</sup> *Wiberg v. U.S.*, 163 U.S. 632 (1896) ; *De Orozer v. U.S.*, 237 F. 1008 (D. Tex. 1916).

<sup>100</sup> *U.S. v. Hart*, 84 Fed. 799 (D Pa. 1897), affirming 78 Fed. 868.

<sup>101</sup> *U.S. v. Tauscher*, 233 Fed. 597 (D.N.Y. 1916).

<sup>102</sup> See Brownlie, *supra* note 77, for a comprehensive treatment of the problems in international relations raised **by** the type of armed band 18 U.S.C. § 960 attempts to discourage.

## IV. CONCLUSION

Four fundamental concepts have been discussed in regard to civil wars, an understanding of which is necessary in a counterinsurgency program as fast and as important as that in which the United States armed forces are playing a part.

The *first* was the nature of belligerency. Even though it is an internal conflict, it has many of the characteristics of an international war, that is, both sides have territory, a government and an armed force organized on traditional lines.

The *second* concept was the nature of insurgency. It is this state of things, lying somewhere between belligerency and sporadic violent unrest, that constitutes one of the main problems now for the military man.

The *third* was the treatment of captives. Anyone engaged in the military phase of counterinsurgency operations must know Article 3 of the Geneva Conventions of 1949. It is the minimum standard for the treatment of captured insurgents and for the treatment of civilian populations sympathetic to their cause.

*Lastly*, in the actual conduct of hostilities there exists in codified law only the 1954 Cultural Convention which the United States has signed but not yet ratified. This does not mean that there are no standards. The United States Army is a civilized army, which implies that it has moral standards. Its members are also subject to the Uniform Code of Military Justice, which imposes a domestic legal standard. The more it does from a sense of oughtness, the more likely will customary law follow in the wake of this practice.

At the beginning of this article it was noted that the military aspect of civil wars is but one part of the counterinsurgency program. The civic action phase brings counterinsurgency into step with the times and with the social changes in underdeveloped countries. The military phase complements this civic phase, but should not obscure it. The words of Horacio de la Costa, a Filipino historian, sum up the whole objective of counterinsurgency.

The Communists have striven mightily to identify themselves with the masses of Asia because they know that the masses in motion are irresistible. You cannot stop a social revolution. You may as well try to block a whirlwind.

It is useless, besides being unjust, to stop social change in Asia. That is not the issue. The issue is who is to control that change. Who is to direct it? Who is to ride the whirlwind? The Communists or the men who are for freedom?<sup>108</sup>

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<sup>108</sup> QUOTED IN BINAMIRA, COMMUNITY DEVELOPMENT—ANSWER TO COMMUNISM 7 (1962).

# SWISS MILITARY JUSTICE"

BY RENÉ DEPIERRE\*\*

## I. INTRODUCTION

If the study of questions of Swiss law presents great difficulties owing to the overlapping of federal, cantonal,<sup>1</sup> and occasionally even municipal laws, this is not the case in military matters, since the heart of the applicable rules is to be found in the federal legislation of the Confederation. However, it is also true that history has strongly marked the evolution of institutions in this area, and one cannot study these institutions if the character of the federal state is disregarded. One must also take into account the plurality of languages and the organization of the Army, which is based on a unique system of militia.

That is why it is first necessary to place military justice in its national and organic context, and then to examine its origins and evolution before attempting to examine its present organization and jurisdiction.

## II. THE NATIONAL AND ORGANIC CONTEXT

### A. *THE HISTORIC AND POLITICAL CONTEXT*

#### 1. *Development of the Federal Structure*

In the present world, when even the large centralized nations are attempting to unite, it may seem curious, or even anachronistic, that

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\*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency or any agency of the Swiss Confederation. The author and the Military *Law Review* gratefully acknowledge the services of William S. Shepard, Captain, JAGC, U.S. Army, for his assistance in translating this article from French and in helping to prepare it for publication. Captain Shepard is currently on the ~~Staff~~ and Faculty of The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

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<sup>1</sup>Member States of the Swiss Confederation are called "cantons." These are, in the official order: Zurich, Berne, Luzern, Uri, Schwitz, Unterwald, Glarus, Zug, Fribourg, Solothurn, Basel, Schaffhausen, Appenzell, St. Gallen, Graubunden, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchatel, and Geneva. The cantons of Appenzell, Basel and Unterwald are each divided into two sub-cantons.

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a country as small as Switzerland should have a federal structure which is composed of no less than 25 states.<sup>2</sup> But each state has its own history, often very different from that of its neighbors.<sup>3</sup> Moreover, cantons were not all united at once, and, finally, four national languages are recognized.<sup>4</sup>

The first cantons were united during the internal struggles of the Holy Roman Empire. Certain others joined the federation following the Burgundian Wars. Other cantons were carved out of earlier members of the federation and were later admitted to the federal league due to the intercession of Napoleon Bonaparte. The last cantons joined the union at the time of the French Restoration.<sup>5</sup>

Before 1798, the date French Republican troops entered Switzerland, the confederated cantons were linked by a network of alliances with various treaties which differed greatly.<sup>6</sup> After the short period of the Helvetic Republic, the Act of Mediation, imposed by Napoleon Bonaparte in 1803, and the Federal Pact of 1815 created a common federal tie. But until 1848, the cantons remained sovereign and retained their own armies. Until that date, the Confederation presented the same characteristics as a number of present-day alliances. The supreme organ of state, the Diet, resembled a diplomatic conference more than a parliament.

On September 12, 1848, on the conclusion of the Sonderbund War,<sup>7</sup> a new constitution was adopted which made Switzerland a federal

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<sup>2</sup> Switzerland has an area of 41,298 square kilometers. Her territory is therefore comparable to that of the Dominican Republic (48,734 square kilometers). The population of the Confederation, nearly 5 million inhabitants, is less than that of Cuba.

<sup>3</sup> The difference in the historical evolution of the cantons is often revealed by divergent political ideas. This element explains Switzerland's unconditional attachment to the principle of neutrality, the only method of avoiding conflicts on the subject of foreign policy. It is doubtless the point that gives to Swiss neutrality its specific character. Cf. Gorge, *La Neutralité Suisse* (Swiss Neutrality): *Le Livre du Soldat* (The Soldier's Manual), p. 84. (The Soldier's Manual is a booklet edited by the Federal Military Department and issued to all officers, noncommissioned officers, and soldiers of the army.)

<sup>4</sup> Article 116 of the Constitution recognizes four national Swiss languages: German, French, Italian, and Romansch, of which the first three are official languages. Three cantons are bilingual (German and French): Bérne, Fribourg and Valais, whereas in Graubünden, German, Italian and Romansch are spoken.

<sup>5</sup> The dates of entry into the Confederation are as follows: Uri, Schwitz, and Unterwald, 1291; Luzern, 1332; Zurich, 1351; Glarus and Zug, 1352; Bern, 1353; Fribourg and Solothurn, 1481; Basel and Schaffhausen, 1501; Appenzell, 1513; St. Gallen, Graubünden, Aargau, Thurgau, Ticino and Vaud, 1803; Valais, Neuchâtel and Geneva, 1815.

<sup>6</sup> Cf. de Reynold, *Conscience de la Suisse* (The Swiss Conscience), p. 201 *et seq.*; Chartres, *Pactes et Traites de la Suisse* (Switzerland's Charters, Pacts and Treaties) (1915).

<sup>7</sup> The Catholic cantons, which were opposed to centralization, had concluded amongst themselves a separate alliance, independent of the federal union (*The*



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state and no longer a confederation. The term "Confederation," nevertheless, was retained to define the central state. That constitution was revised in 1874 and has undergone numerous modifications since that time which have greatly increased federal authority at the cantons' expense.

Nevertheless, the cantons have conserved a large amount of autonomy and more often than not are charged with the execution of the federal laws. In particular, they have retained authority, with a few exceptions, over matters of judicial organization and procedure.<sup>8</sup>

### 2. *Development of a Federal Army*

Until the advent of the Helvetian Republic of 1798, there was no federal army. However, the cantons already had a certain number of common rules which had established a real unity of military doctrine. These rules concerned the common defense and forbade civil wars.<sup>9</sup>

In 1803, when Napoleon imposed the Act of Mediation, he created a federal army to assure the guarantee which the cantons had mutually promised each other. These troops were formed of contingents from the cantons whose numbers were proportionate to the population of the states of the confederation. It was the first inroad on the sovereignty of the cantons. The cantons, however, retained their **own** armies.

The Federal Pact of August 7, 1815, did not provide for a federal army, but it did institute a federal military staff, which implied a limitation on the military powers of the cantons. However, the cantons retained authority over the instruction, arming and equipment

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*Sonderbund*) ; in the Protestant cantons the idea of a Federal State prevailed. War broke out between the two groups. The Protestant cantonal troops, under the command of General Dufour, waged a rapid campaign during the course of which acts which could have hindered the subsequent establishment of a lasting peace were avoided.

<sup>8</sup> Inasmuch as the provisions of the federal Constitution do not make any mention of military justice, one might question whether the existence of the military courts is constitutional. The same problem might be asked considering the guarantee of an ordinary judge provided by Article 58 of the Constitution. The question has been resolved affirmatively. See, on this subject: Willi, *Die Trennung der militärischen von der bürgerlichen Gerichtsbarkeit nach schweizerischem Recht* (The Separation Between Military and Civilian Jurisdiction in Swiss Law) (1954), and the resume of this work by Steiner in 1955 *Revue militaire suisse* (Swiss Military Review) 459; Graven, *La garantie du juge naturel et l'exclusion des tribunaux d'exception* (The Guarantee of An Ordinary Judge and Exclusion of Special Courts), in the collective work, *La Liberte du citoyen* (Liberty of Citizens), published by the Swiss Faculties of Law, at page 212 *et seq.* (1948); Depierre, *La Justicia Militar Suiza* (Swiss Military Justice), in 1957 *Revista Espanola de Derecho Militar* (Spanish Review of Military Law) 101 *et seq.*

<sup>9</sup> Cf. The Soldier's Manual, p. 91.

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of the troops. As for the cadres, henceforth they were formed in a central school to which a training camp was added. Finally, a military surveillance committee made efforts to unify the army.<sup>10</sup> But the cantons held firmly to the principle of cantonal contingents.<sup>11</sup>

After the Sonderbund War, the Constitution of 1848 and the Law of 1850 Concerning the Military Organization of the Confederation maintained the system of cantonal contingents, but submitted the instruction of the troops to the rigid control of the Federal Council. Mobilization at the time of the Franco-Prussian War of 1870 revealed the inadequacies of this system. Accordingly, when the Federal Constitution was revised in 1874, a federal army was set up. However, the cantons retained certain areas of responsibility, primarily with regard to the troops who had previously constituted part of their contingent. Conversely, only the confederation had authority over new and technical arms, but the cantons retained control of administrative matters.<sup>12</sup>

Two constitutional articles define the relative powers :

*Article 19.* The federal army comprises :

- a) Corps of troops from the cantons;
- b) all **Swiss** who do not belong to these corps, but who are nevertheless subject to military service.

Jurisdiction over both the army and its equipment provided by law is the province of the Confederation.

In case of danger, the Confederation also has the exclusive and direct right to command the men incorporated into the federal army, and all the other military resources of the cantons.

"the cantons command military forces from their territory insofar as that right is not limited by the Constitution or by federal laws.

*Article 20.* The laws concerning the organization of the Army emanate from the Confederation. The execution of the military laws in the cantons will be accomplished by the cantonal authorities under limitations which will be **fixed** by federal legislation and under the supervision of the Confederation.

Military instruction, as a whole, belongs to the Confederation; the same is true of armament.

The supplying and maintenance of clothing and equipment remain in the cantonal jurisdiction ; however, the resulting expenses will be made good to the cantons by the Confederation, according to the rules to be established by federal legislation.

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<sup>10</sup> See *Les milices vaudoises*, in Cent Cinquante Ans de'Histoire Vaudoise, 1803-1953 (The Vaud Militia, in 150 Years of Vaud History, 1803-1953), p. 88.

<sup>11</sup> The Soldier's Manual, p. 93.

\*Article 21 of the Constitution also stipulates: "The composition of these corps of troops, the responsibility for maintaining their strength, and the nomination and promotion of the officers of these corps belongs to the cantons, with the reservation of the general regulations which will be transmitted to them by the Confederation."

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These two articles were applied in the military organization law of 1874 and in the law of April 12, 1907.<sup>13</sup>

### 3. Policy of Neutrality and Service Abroad

After the defeat of Marignano (today Melegnano) in 1515, the Swiss Leagues renounced the policy of conquest that they had undertaken, particularly in northern Italy. One might say that Marignano also marked the beginning of the policy of neutrality.<sup>14</sup>

But that battle also marked the beginning of military service abroad. From that time, Swiss regiments became engaged in all the European countries, under a system called "military capitulations" (mercenary contracts).<sup>15</sup>

At the present time, mercenary contracts and military service abroad are forbidden,<sup>16</sup> but the influence of the organization of such regiments in service abroad can still be felt on several military institutions.

## B. THE MILITIA SYSTEM

From its very beginnings, the Confederation possessed original military institutions. Military service was mandatory for everyone from 18 to 60 years of age: nobles, peasants, and serfs. Youngsters were enrolled and studied military subjects until they were 16 and then became soldiers at 18.

The broad outlines of this system still remain. Under the terms of the Swiss Constitution every Swiss is subject to military service. The service obligation extends from the beginning of the twentieth year to the end of the fiftieth year (Art. 1 OM), although purely military obligations cease at forty-eight (Art. 2, cl. 1, OM). As for officers, they serve until the end of the year in which they attain the age of fifty-five.<sup>17</sup> Men classified as physically fit at the time of re-

<sup>13</sup> Law concerning Military organization, April 12, 1907 (hereinafter referred to as OM). This law has been modified several times, the most recent amendments being enacted on December 21, 1960.

<sup>14</sup> Gorge, *Swiss Neutrality ; The Soldier's Manual*.

<sup>15</sup> Cf. de Vallières, *Honneur et Fidélité* (Honor and Fidelity),

<sup>16</sup> Beginning in 1830, certain cantons forbade mercenary contracts on their territory. The Constitution of 1848 extended that prohibition to the entire territory of the Confederation. Then, Article 98 of the Criminal Justice Law for Federal Troops, of August 27, 1851, and Article 65 of the Federal Penal Code, of February 4, 1853, were adopted, which provided penalties for those who enlisted Swiss for service abroad. Finally, the Law Concerning Enlistments for Military Service Abroad, of July 30, 1859, also permitted the prosecution of those who enlisted without the authorization of the Federal Council. The question is now covered by Article 94 of the Military Penal Code, which maintains the same rule. However, the authorization of the Federal Council is not necessary for enlistment in the Papal Guard.

"After the end of their military obligations, however, men may still be incorporated into local units of the domestic guard. This permits taking ad-

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cruitment serve in one of the branches of the service or in one of the complementary services. They are classified by age into three groups: the "elite," from 20 to 32 years of age; the "landwehr," from 33 to 42 years of age; and the "landsturm," from 43 to 50 years of age (Art. 35, OM). When a man is not subjected to military service, he has to pay a special tax called the exemption tax.<sup>18</sup> Finally, women may volunteer for duty in the complementary services and serve from 19 to 40 years of age, subject to their abilities.<sup>19</sup>

When not attending the instruction periods (recruit school, drill periods or relsted instruction, special courses, etc.). the citizen does not cease to be a soldier: he takes home his equipment, his individual weapon (assault gun, rifle or pistol), and his personal ammunition. This permits very rapid mobilization. The citizen continues to belong to the same unit, and he knows the commanding officer to which he must always communicate his change of address. Finally, he is subject to many obligations: the care of the objects which have been entrusted to him, compulsory target practice, the inspection of his weapon and equipment during the years when he does not participate in courses of instruction, the obligation to request a military leave when he will travel abroad for more than three months, etc. As for officers, while at home they continue to administer their unit, and they must complete various tasks which might be assigned to them (studies, course preparation, etc.). All have the moral obligation to perfect their military knowledge; they do this in military societies and sports clubs.<sup>20</sup>

Article 13 of the Swiss Constitution forbids the Confederation from maintaining a permanent army, although the confederated states may have a career army at their command, whose strength may not exceed three hundred men. Career soldiers are, therefore, rare. They comprise instructional personnel (officers and non-commissioned officer instructors) who are also incorporated into the corps of militia troops. Career soldiers also include personnel affiliated with maintenance and surveillance organs who work in collaboration with the troops and assure the maintenance of the gear and installations, such

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vantage of the experience which they have acquired in the Army. Cf. *Loi federale sur la protection civile* (Federal Law Concerning the Domestic Guard), of March 23, 1962, which came into effect on January 1, 1963.

<sup>18</sup> Swiss Constitution, art. 18. cl. 4; OM, Art. 3. This tax is regulated by the Federal Law Concerning the Military Service Exemption Tax, of June 12, 1959.

"Article 20, OM, and Article I, of the Ordinance Concerning the Women's Auxiliary Service, of December 26, 1961.

<sup>20</sup> Military societies are numerous. Besides the most important, which are the Swiss Officers' Association and the Swiss Noncommissioned Officers' Association, there are a great number of societies reflecting the various branches of the service (The Artillery Society, The Engineers' Society, etc.). One must add to this list the shooting clubs under the Swiss Carabineers' Society.

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as corps of fortifications guards, surveillance squadrons, and, last but not least, the commanders of the corps and units of the Army.

### C. *PRESENT-DAY ORGANIZATION OF THE ARMY*

According to the terms of the Federal Troop Organization Decree,<sup>21</sup> the army consists of: the staffs, the general staff, the branches (infantry, mechanized and light troops, artillery, aviation, anti-aircraft, engineers, communications, medical and veterinary services, quartermaster troops, ordnance troops, and aerial protection troops), the auxiliary services (territorial service, transport, munitions, stores services, military police, field post, military justice, chaplains, "Armee et Foyer" (Home and Army) and the staff secretariat), and the complementary services.

The army is split up into an army staff, three field army corps, a mountain army corps, aviation troops and anti-aircraft forces (Art. 2, OT). Each field army corps includes an army corps staff, one mechanized division, one field division, one frontier division, army corps troops, frontier brigades and one territorial brigade, whereas the mountain army corps includes, other than its staff and the army corps troops, three mountain divisions, frontier, fortress and intrenched brigades,<sup>22</sup> as well as territorial brigades (Art. 3, OT).

Infantry regiments are usually recruited from the same canton; other regiments, as far as possible, from the same linguistic region.<sup>23</sup>

## III. HISTORY OF MILITARY JUSTICE

The evolution of military justice is closely connected with that of the institutions of the Confederation.<sup>24</sup>

### A. *L'ANCIEN REGIME (PRÉ-1798)*

During the period which ended with the French invasion of 1798, military justice developed on two different planes: the cantonal armies and the troops in service abroad.

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<sup>21</sup> Decree of the Federal Assembly Concerning the Organization of the Army (Troop Organization), December 20, 1960 (hereinafter referred to as OT).

<sup>22</sup> *Brigades de réduit*. These brigades take their name from those Swiss units in the Second World War which occupied and reinforced the Alpine portion of Switzerland and which were to defend their positions at all costs.

<sup>23</sup> The Soldier's Manual, p. 42. This apportionment is, moreover, in conformance with Article 21 of the Constitution, which reads as follows: "As far as military considerations will permit, troop corps should be composed of troops from the same canton."

<sup>24</sup> Cf. Krafft, *La Justice Militaire* (Military Justice) (1918); Haefliger, *Kommentar zur Militär-strafgerichtsordnung* (Commentary on Military Criminal Court Orders) (1959).

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### 1. *Development in the Cantonal Armies*

In the cantonal armies, the organization of the military judiciary and the substantive law responded to the *Heimatprinzip*, that is to say, the principle that the authorities of the accused's canton of origin retain jurisdiction over him, and apply the substantive law of that canton. Minor offenses were judged by officers of the company, the youngest officer presiding. For serious offenses, an investigation was made by the officers, and then the accused was turned over to the civilian authorities of his canton of origin, to be judged there in conformance with local law. The same was true for officers accused of crime.

This system—founded on the sovereignty of the cantons—led to the result that, during the course of a campaign waged by several confederated cantons, the soldiers of different states who had participated in the same infraction were judged by different authorities and according to different rules. The consequences of this system were sometimes bizarre; for example, after the battle of Marignano, one Bachmann, a traitor, was prosecuted and tortured; he implicated, as accomplices to his felony, 24 officers of different cantons who escaped all punishment, since their cantons of origin did not prosecute them.

On March 18, 1668, the Swiss Diet, meeting at Wil, adopted a text entitled the "Defensionale," which maintained the jurisdiction of the authorities of the accused's canton of origin. An executioner, therefore, followed the federal armies and judgments were rendered in the field. But, in such cases, the confederated officers who rendered judgment did not act by virtue of their own jurisdiction, but as delegates of the authorities of their own canton.

As far as substantive law is concerned, certain common rules were adopted on July 10, 1393, in the Covenant of Sempach (*Sempacher Brief*), which forbade burglary by a confederate in time of war as in time of peace and pillage before it had been ordered by the officers; likewise, it obliged the soldiers to hand over booty to their officers, who were charged with its division; and, finally, it condemned the desecration of churches and also rough treatment of women and girls.

### 2. *Development in Swiss Regiments Abroad*

Swiss regiments in service abroad enjoyed numerous privileges. Most importantly, these troops did not concede that they could be judged by a law other than by their own or by judges of the enlisting country;<sup>25</sup> these mercenaries were therefore tried, in accordance with the *Heimatprinzip*, by their own judges, selected from their own

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<sup>25</sup> See, for example, Article VIII of the 1668 Treaty of Alliance with Louis XIV.

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force. This practice constituted for them the guarantee of an impartiality and an objectivity which they perhaps could not have expected from other judges. Moreover, this practice conformed with the pre-occupation of the confederates, previously expressed in the Pact of 1291, never to accept foreign jurisdiction.<sup>26</sup> However, the soldier-judges encountered serious difficulties; there were as many laws as cantons, and the judges did not know them. To remedy this situation, anthologies were compiled, containing digests of the laws of nations, disciplinary, penal and administrative regulations, etc. Little by little, the law of the canton of origin was abandoned and replaced by law pertaining to the enlisting country and applicable only to the Swiss regiments. The most famous of the anthologies of this type is the Criminal Code of the Emperor Charles V for the Use of Courts-Martial for Swiss Troops, popularly called *La Caroline*, which also contained rules for judicial organization. It instituted a high court called the "Captains' Council," formed of staff officers and captains, which functioned primarily as an accusatory body (arraignment) and as a reviewing board, but not as a court of appeals. On the other hand, all the officers of the accused's regiment had to be on the court-martial bench; however, differences in rank were suspended and the officers did not wear their insigna of rank.

### B. RECENT EVOLUTION

After the invasion of 1798, there were different attempts to establish a unified military law. Under the Helvetian Republic, a law passed on July 27, 1799, and modified as early as November 24, 1800, set up, for each battalion, a disciplinary council of seven members for minor infractions, a 20-member court-martial for more serious offenses, and a reviewing board of 11 members which was charged with examining all of the judgments of the other councils.

During the period 1803-1815, attempts to unify military law were pursued. Different laws were unified in a statute adopted by the Diet in 1817, which divided punishable acts into three classes: (1) disciplinary infractions over which the officers themselves had jurisdiction; (2) more serious offenses, to be judged by brigade tribunals; (3) crimes where jurisdiction was entrusted to a higher military tribunal. This document was replaced by the Law of 1837, an important

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<sup>26</sup> "The treaty of 1291 contained the following passage: "We are agreed not to receive in our valleys any judge who is not a citizen, or any judge who has purchased his office" (translation from the Latin—the passage appears in The Soldier's Manual).

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**work**, which also contained rules of substantive law and is called, in the more recent editions, the Military Penal Code.<sup>27</sup>

After the constitution of the Federal State of 1848, the statutes were entirely revised. The Law concerning Penal Justice for the Troops of the Confederation, of August 27, 1851, made provision for: (1) at least as many tribunals as there were brigades in the Army (Art. 216), composed of a presiding judge, two other judges, and two assistants as well as eight jurors (12 if a capital offense was in question), the presiding judge and the prosecutor being chosen by the officers of the judicial staff; (2) a Supreme Court composed of five officers (of which three belonged to the judicial staff), including the president and three assistant judges; (3) a Special Military Tribunal consisting of a presiding judge and eight members, four of whom are military personnel and four of whom are civilians chosen from among the presiding judges of the superior courts of the cantons; (4) a judicial staff which furnished the officials "having the necessary special qualifications" and being commanded by the Chief Prosecutor; and (5) cantonal military tribunals and a Supreme Court for each canton.

The various legislative acts that, since the end of the *ancien regime*, have marked the evolution of Swiss military justice are all based on the system that was current in the regiments in service abroad. This solution has been maintained in the present-day system; it is, moreover, peculiarly well-adapted to the militia system of the Swiss Army, since men from all walks of life, including the most eminent jurists, serve under the colors.

### IV. PRESENT-DAY ORGANIZATION

#### A. JUDICIAL ORGANIZATION

The creation, following the adoption of the Constitution of 1874, of a unified federal army, composed of both federal and cantonal troops, equipped and instructed according to the same principles, all organized by the use of federal laws, and incorporated into federal army units, did away with the necessity for cantonal military tribunals. The Law of June 28, 1889, concerning Military Organization and Penal Procedure for the Federal Army confirmed their abolishment. On the other hand, the centralization of the army permitted assigning

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<sup>27</sup> Therefore, the remarkable fact occurred that military penal law was unified one hundred years before the civil penal law. In effect, although the Constitution of 1874 was modified in 1898 in order to give jurisdiction to the Confederation to enact general penal legislation, it was only in 1938 that the Swiss Penal Code, which came into effect January 1, 1942, was adopted by popular referendum. The fundamental principles of the Swiss Penal Code are, furthermore, the same as the Military Penal Code of June 13, 1927, as modified by the Laws of June 13, 1941, and December 21, 1950 (hereinafter referred to as CPM).



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more importance to the army unit (the division). As the division is the key unit of a unified command for troops of different arms, it was natural that the division would become the core of matters of jurisdiction.\*\*

Present federal legislation establishes :

- (a) division and territorial tribunals;
- (b) a Military Supreme Court;
- (c) a Special Military Tribunal; and
- (d) a judicial staff, known as a Military Justice Corps, placed under the command of the Prosecutor-in-Chief of the Army.

### 1. *Disciplinary Infractions*

Disciplinary infractions<sup>29</sup> have remained, as with previous legislation, the province of commanding officers. Jurisdiction over each infraction is defined by the seriousness of the offense; at each rank, beginning with captain, there is a corresponding jurisdiction to adjudicate sentences, and only officers of a higher rank may pronounce more stringent sanctions. Thus, a captain may inflict a reprimand, "arrets simples" (restriction) up to five days, or "arrets de rigueur" (confinement) for three days; a major may pronounce a reprimand, restriction up to ten days, or confinement for five days, etc.<sup>30</sup> The maximum penalty is set at 20 days' arrest (**Art. 186, CPM**). The decision of each officer can be the object of one review by the officer who exercises the next superior command. During periods when the soldier is not in the service, disciplinary power belongs to the civilian authority, federal or cantonal, which is charged with the administration of military affairs. These authorities may also inflict fines up to 200 Swiss francs.<sup>31</sup> However, in certain cases, the head of the Mili-

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<sup>28</sup> Article 11 of the Law Concerning Judicial Organization and Criminal Procedure for the Federal Army, June 28, 1889 (hereinafter referred to as OJPPM), as confirmed by Article 4, OM. The rules which organize military justice have undergone several detailed modifications since 1889. None, however, has altered its fundamental principles. It became necessary instead to adapt that organization to that of the troops. That is why the rest of this study will examine its present organization without mentioning intervening changes.

<sup>29</sup> He who disobeys orders and military regulations commits a disciplinary infraction. Disciplinary infractions may be committed intentionally or through negligence. Cf. Gay, *Droit Penal Militaire* 111, *Aperçu de droit matériel* (Military Penal Law 111, A Look at Substantive Law), *Fiches Juridiques Suisses* (Swiss Legal Papers) No. 795, p. 1.

<sup>30</sup> *Arrets simples* or open arrest results in the prisoner being detained, if possible in isolation, in quarters designed for this purpose. He performs duty or work, but spends non-duty hours locked up in the quarters. As to those who are sentenced to *arrets de rigueur* or closed arrest, they are detained in isolation in premises especially designed for this purpose and do not perform duty.

<sup>31</sup> CPM, Art. 191. Cf., on this subject: Uldry, *Le droit disciplinaire dans le Code pénal militaire suisse* (Disciplinary Law in the Swiss Military Penal Code) (1943); Steiner, *La repression des fautes de discipline* (Punishment of

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tary Department or the Commander-in-Chief of the Army<sup>32</sup> can pronounce reduction to the lowest enlisted grade.=

### 2. *Military Tribunals of First Instance*

Jurisdiction over offenses belongs *in the first instance* to *division tribunals* and to *territorial tribunals* and, in some circumstances, to the *Special Military Tribunals* (Art. 54, OM; Art. 11, OJPPM). Under the terms of the Decree of the Federal Council concerning the Jurisdiction of Division Tribunals and Territorial Tribunals, of December 4, 1961 (ATM), 1.<sup>o</sup> divisional tribunals were established and, in time of active service, 10 territorial tribunals. Each of these tribunals is composed of a high judge (president) and six other judges, of whom three are officers and three are noli-commissioned officers or soldiers. Moreover, a prosecutor and a clerk are attached to the tribunal (Art. 13, OJPPM). The presiding judges and the assistant judges are named for three years by the Federal Council (Art. 1, OJPPM). As for investigations, they are prepared by an examining magistrate, in the grade of captain, assisted by a clerk, both belonging to the Military Justice Corps. The law of 1889 has therefore abolished the jury, even for crimes which might result in the death penalty; the same is true for the Special Military Tribunal.<sup>34</sup>

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Disciplinary Infractions), in *Revue militaire suisse* (The Swiss Military Review) pp. 470 *et seq.* (1956).

<sup>32</sup> The Swiss Army has the peculiarity of being provided with no Commander-in-Chief until a mobilization is ordered or anticipated (Art. 204, OM). He is the only officer with the rank of general and is elected by the Federal Assembly (the two houses sitting in joint session) under the same procedure, as for example, the members of the Federal Council (Art. 85, Swiss Constitution). The General, therefore, has the status of a high functionary of the Confederation and must render an account of his actions to the Federal Assembly and not to the government. Since 1815, there have only been five generals. In 1831, at the time of a conflict with France, the Diet named as Commander-in-Chief Guiger de Prangins, of Vaud; at the time of the Sonderbund, it was General Dufour (1847), who was called a second time to the Supreme Command in the conflict with Prussia in 1856-1857. During the Franco-Prussian War of 1870-1871, command was exercised by General Hans Herzog; then, during the First World War, by General Ulrich Wille. Finally, at the beginning of September 1939 the two houses sitting in joint session elected General Henri Guisan, who served until August 1945.

<sup>33</sup> CPM, Art. 201. See also The Federal Council's Ordinance of September 18, 1961, Concerning the Duties of the Military Department, the National Defense Commission and Troop Commanders (*L'Ordonnance sur les attributions*).

<sup>34</sup> The death penalty has disappeared from Swiss penal legislation. It remains only in military law, but in principle it can only be pronounced in wartime. However, it can be pronounced in time of active military service in cases of military treason and security violations concerning the national defense. Military tribunals may only inflict the death penalty on the concurrence of six out of the seven judges (Art. 148, OJPPM). The death penalty is executed by a firing squad (Art. 210, OJPPM). *Droit Penal Militaire III, Aperçu de droit matériel* (Military Penal Law 111, A Look at Substantive Law), Swiss Legal Papers No. 795, p. 2.

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The fundamental concept that the tribunal will be composed of individuals who are from the military unit over which the tribunal has jurisdiction is carried out in the composition of these tribunals, especially in the divisional tribunals. Only the presiding judge, a colonel or lieutenant colonel, the prosecutor, a major or captain, and the clerk, a captain or first lieutenant, are members of the Military Justice Corps. It also frequently happens that even these members have previously served in the army unit to the tribunal of which they are now assigned. The other judges are chosen from the troops over which the tribunal exercises jurisdiction, and they continue to serve in their troop corps (Art. 12, OJPPM). They, therefore, have practical experience in military matters and as regards the necessities of service. The nominating authority attempts to designate judges whose profession specially prepares them for their work: civil judges, lawyers, notaries, civil servants with legal training, etc. Beside these persons, however, sit men of various other professions, who are purely laymen. The Federal Council, moreover, is under an obligation, in determining its choice, to take into account the language of the troops subject to the tribunal's jurisdiction (Art. 12, cl. 3, OJPPM). Two divisional courts are even made up of two sections. One contains a German language section and Italian language section, while the second is subdivided into a German language section and a French language section.

The *Special Military Tribunal* is composed of three colonels from the Military Justice Corps and four army corps commandants or divisionary colonels. There are also four assistants: two colonels from the Military Justice Corps and two army unit commandants (Art. 21, OJPPM). The Chief Prosecutor and a Clerk are attached to it (Art. 20, OJPPM). The members of the tribunal and their assistants are designated on a case by case basis by the Federal Assembly, which also designates the president and his assistant (Art. 21, OJPPM). The assistant to the Chief Prosecutor functions as an examining magistrate in the area of this tribunal's jurisdiction.

### 3. *Military Supreme Court*

The judgments of the division and territorial tribunals may be appealed to the *Military Supreme Court*. This court, the members of which are named by the Federal Council for three years, is composed of a presiding judge of the grade of colonel, four associate judges and two assistants (Arts. 17 and 18, OJPPM). The law specifies that the presiding judge must be an officer of the Military Justice Corps (Art. 9, OJPPM), but it does not require that the other judges belong to the judicial staff; it provides, however, that all must have legal training and that those who do not belong to the Military

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Justice Corps continue to serve in their respective outfits (Art. 18, OJPPM).

The members of this court are actually all chosen from among law school professors, judicial magistrates, and lawyers. As for the clerks, they are also eminent practitioners: lawyers, tribunal presidents, clerks of the Federal Tribunal, notaries, etc. Another rule, which is not found in the legal texts, must be mentioned. There is a customary rule which dictates that the country's different geographical regions, and particularly the linguistic minorities, be represented on the court. In fact, this rule is followed throughout all of the agencies of the Confederation.

### 4. *The Military Justice Corps*

As for the officers of the Military Justice Corps, this group is formed of officers who have served in the ranks, at least as junior officers. It is made up of judges, lawyers, lawyer civil servants from judicial and administrative sources, notaries, etc. (Art. 10, OJPPM). Nomination to the Corps is the province of the Federal Council. The Corps furnishes (Art. 9, OJPPM): the Chief Prosecutor of the Army; his assistant; the presiding judge of the Military Supreme Court; the high judges; the prosecutors; the examining magistrates; and the clerks of military tribunals and of the examining magistrates.<sup>35</sup>

## B. JURISDICTION

### 1. *In General*

Jurisdiction of military tribunals is defined in two senses, *i.e.*, *ratione materiae* (jurisdiction over the subject matter) and *ratione personae* (jurisdiction over the person). This double criteria is implicitly contained in Article 218, OM: "Each person to whom military law is applicable is equally subject to the jurisdiction of military tribunals." In conformance with that disposition, the Military Penal Code determines the jurisdiction of military tribunals and provides the general rules concerning the application of military penal law.<sup>36</sup> These rules distinguish three different situations:

(a) peacetime service, *i.e.*, periods during which the troops are only obliged to attend periods of instruction;

(b) active service, *i.e.*, periods during which the army or a part thereof is mobilized by the Confederation or the cantons<sup>37</sup> to assure

<sup>35</sup> Cf. Gay, *Droit Penal Militaire IV. Organization judiciaire* (Military Penal Law IV, Judicial Organization). Swiss Legal Papers **So. 796**.

<sup>36</sup> Cf. Gay, *Droit Penal Militaire I, Sources-Champ d'application* (Military Penal Law I, Sources-Fields of Application). Swiss Legal Papers **No. 793**.

"According to the terms of Article 196, OM, "The cantons control their armed forces on their own territory as long as they are not at the command of the Confederation."

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the defense of the country or the maintenance of domestic order and tranquility; and

(c) a state of war, which exists not only when the Confederation is engaged in wartime activities, but also (Art. 5, CPM) in case of imminent war, when the Federal Council puts into operation the established steps to prepare for war.

Jurisdiction *ratione personae* is variously defined for each of these three situations.

In the first case, persons subject to military jurisdiction are those who have military duties when they are under the colors,<sup>38</sup> and, between the periods when they are wearing their uniforms,<sup>39</sup> or for questions concerning their military status and the requirements of service.<sup>40</sup> Military jurisdiction also is vested over the following categories: persons who must present themselves for recruitment; regular army personnel; civil servants and employees of the administration for acts which concern the national defense, and when they are in uniform; civilian employees who perform special work for the troops, and civilians accused of treason for betrayal of state secrets concerning the national defense, sabotage, undermining the national defense of the country or failure to obey instructions or orders given with the view of preparing or executing mobilization of the army.

In case of active service, the Federal Council can make subject to military laws the civil servants, employees and workers of the military administration, establishments and workshops, as well as the public and transportation administrations (Art. 202, OM). It can, moreover, submit to military penal law—and by the same token to military tribunals—civilians who are charged with committing certain crimes or certain delineated acts; interned military personnel of belligerent powers, including members of resistance movements and civilians accompanying the armies; and finally, civil servants, employees and workers of certain vital services, such as water distribution, hydraulic plants, electric plants, gas-producing concerns, hospitals, etc. (Art. 3, CPM).

In wartime, the jurisdiction of military tribunals is extended further to persons accompanying the army, to civilians who commit

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<sup>38</sup> Here we are speaking of soldiers attending recruit school, officers and non-commissioned officers, and those who take part in annual active duty (the elite), or complementary or special courses (such as technical, tactical or marksmanship courses). The annual active duty includes instruction periods as well as maneuvers and exercises.

<sup>39</sup> This concerns principally the situations wherein competent authority, whether federal or cantonal, has authorized the wearing of the uniform, such as participation in a military athletic contest, a meeting of a military society, patriotic manifestations, military funerals, etc.

<sup>40</sup> Recruiting, the service obligation, and extra-service obligations. See Section III B, *supra*, relating to the militia system.

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certain delineated infractions, to prisoners of war, to enemy parlementaires and persons accompanying them who abuse their situation to commit infractions, and to civilians interned in battle regions or occupied territory.

In all cases, however, it is also necessary that these persons be charged with an offense cognizable under the Military Penal Code, or else the civilian tribunals retain jurisdiction over them (Art. 219, cl. 1, CPM). If, however, the offense is not cognizable under military law, but it is committed by a person over whom a military tribunal has jurisdiction and pertains to the accuseds' military status, then a civil prosecution cannot proceed without the authorization of the Military Department or, in a proper case, the Commander-in-Chief of the Army (Art. 219, cl. 2, CPM).

If several persons have jointly committed a purely military offense, and some but not all of the offenders are subject to military law, then, in derogation of the general rules just mentioned, only military tribunals have jurisdiction over the case. If the offense is an infraction of the common law, the accused who are not subject to military law are, on the other hand, the province of the civilian tribunal. In that case, the Federal Council can order that persons subject to military jurisdiction be remanded to the civil tribunal, which will then apply military law (Art. 220, CPM).

Finally, when a person commits several infractions, some of which are cognizable under military jurisdiction and others under civilian jurisdiction (Art. 211, CPM), the Federal Council can refer all of these offenses to either the military or the civilian tribunals; in peacetime, these cases are usually submitted to civilian jurisdiction, whereas in a period of mobilization, where civilian judges are, for the most part, under arms, the government will have the tendency to submit them to military jurisdiction. Finally, in case of a conflict between military and civilian jurisdiction, the Federal Tribunal (the supreme judicial authority of the Confederation) has the authority to designate which court has jurisdiction (Art. 223, CPM).

It is important to observe, finally, that the general jurisdiction of the organs of military justice is not determined *ratione loci* (by reason of the place where the offense occurred). In effect the military penal code is applicable to offenses committed abroad.

### *2. Jurisdiction of the Division Tribunal*

The division tribunal is the basic instrument of Swiss military justice,<sup>41</sup> and the usual court of first instance. In time of peace it

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<sup>41</sup> The wording of Article 54, OM, is very clear on that point. The division tribunals are foremost, whereas the territorial tribunals are indicated under the generic term "supplementary tribunals." That relative importance between

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constitutes, with the exception of cases heard by the Special Military Tribunal, the only functioning court.

Its jurisdiction is precisely defined by reason of its appurtenance to an army unit, the *for de l'incorporation* (tribunal of enlistment). Troops dependent on an army corps are subject to the authority of a division tribunal of that corps, and brigade personnel are under the jurisdiction of an adjacent division tribunal. Nevertheless, one who is attached to an army unit other than the one to which his troop corps belongs, will appear for offenses committed during that service before the tribunal of the division to which he is attached (*for de attribution*, tribunal of assignment).

But these jurisdictional rules of attachment are often insufficient. What is the situation of troops who are not attached to a division but are attending service schools and belong to different army units? To cover these situations, the division tribunals are also given territorial jurisdiction (Art. 5, ATM), defined by territorial districts (jurisdiction *ratione loci*, by reason of the place where the offense occurred). This jurisdiction is always subsidiary; if an offense is committed by a soldier and the rules of the tribunal of enlistment or the tribunal of assignment are not applicable, it is the forum of the place where the offense occurred which will have jurisdiction (Art. 4, ATM). If the offense is committed during a course or at a service school, there is an extension of the forum in the sense that the division tribunal of the area where the school is conducted has jurisdiction, even if the offense took place at the time of a movement of the course or school in a region not territorially submitted to its jurisdiction (Art. 3, ATM). However, when the accused speaks a different language than that of the tribunal which has territorial jurisdiction (for example, a French-speaking soldier attending a school in a German-speaking region), the Bureau of Federal Military Administration can select a tribunal other than the one which normally has jurisdiction, with a view to protecting the accused's guarantee that he will be judged by judges who speak his own language (Art. 9, ATM). In any event, in the situation where different languages are spoken, and when the court which has jurisdiction *ratione loci* is chosen, Article 156, OJPPM, stipulates that: "When the accused does not understand the language spoken in the proceedings, he must be given an understanding, through an interpreter, at least of the conclusions of the prosecutor and defense counsel."

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the two tribunals is again shown by statistics relative to the military justice activity during the Second World War. In effect, out of 23,500 cases between 1939 and 1945, division tribunals handled 17,900, whereas territorial tribunals only treated 5,600. Since the war, the division tribunals have heard some 800 cases. (These figures were furnished with the kind cooperation of the Bureau of Federal Military Administration.)

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### 3. *Jurisdiction of the Territorial Tribunal*

Territorial tribunals are of minor importance.<sup>42</sup> They do not function except during wartime or mobilization and their jurisdiction is based solely on the place of the commission of the offense. Furthermore, their jurisdiction is equally limited *ratione personae*: they are only concerned with offenses which do not involve Swiss soldiers and those committed by interned military personnel (Art. 7, ATM).

### 4. *Jurisdiction of the Military Supreme Court*

The Military Supreme Court passes judgment on appeals from the judgments of division or territorial tribunals (Arts. 19 and 187, OJPPM).

This court does not have unlimited powers, however. The court of first instance is actually the final authority of facts and weighs the evidence in its discretion (Art. 158, OJPPM). Accordingly, a decision may not be reversed on the ground that the facts are contrary to the documents in the record. The Military Supreme Court is, therefore, bound by the evidence admitted by the trial judges; it can neither change nor complete them. However, the Military Supreme Court can take a fresh look at the facts in the case where there is an obvious mistake or an arbitrary decision, that is to say, when the deliberations of the trial court seem absurd alongside the content of the record, or when the facts relied upon in the judgment would render impossible the conclusions reached.

The rule concerning the immutability of facts is spelled out as follows :

Judgments may not be overruled except in the following cases :

1. When the judgment contains a violation of the law ;
2. When the tribunal was not regularly constituted, or when it has not taken into account a legal ground for exclusion or a well-founded objection ;
3. When the tribunal wrongly assumed jurisdiction to decide the case on the merits ;
4. When the primary instructions were given in the absence of a person whose presence was required by law ;
5. When the essential procedural safeguards have been violated ;
6. When the defense has been hindered in an inadmissible manner on a decisive point ;
7. When the judgment is unjustified.

However, there may be no reversal for a ground indicated in numbers 2 through 6, if, during the course of the proceedings, the party appealing has already presented inferences which are based upon the alleged irregularity."

The result is that when a judgment is substantively challenged, the Military Supreme Court must be contented with a re-examina-

<sup>42</sup> See note 41 *supra*.

<sup>43</sup> OJPPM, Art. 188, cl. 1, ch. 1.



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tion—except in the case of arbitrariness—of the application of the law to the facts. In that case, it is authorized to render a new judgment if the law has been misapplied. In other types of appeals, the judgment is overruled and remanded to the same division tribunal, unless the Military Supreme Court considers it preferable to remand the case to a different division tribunal (Art. 196, OJPPM). Additionally, if the case is not within the jurisdiction of the military justice tribunals, the Military Supreme Court will annul the judgment (Art. 195, OJPPM).

### 5. Jurisdiction of the *Special Military Tribunal*

The composition of the Special Military Tribunal—which, by the way, to the author's knowledge has never been constituted—implies a rather restricted jurisdiction. That jurisdiction is defined as *ratione personae* (Art. 22, OJPPM). The following persons are subject to its jurisdiction: the Commander-in-Chief of the Army, his Chief of Staff, the Commanders of the Army Corps and their Chiefs of Staff, divisionary colonels, other commanders of army units and service branch heads, as well as other military personnel who are accused jointly with these military leaders.

The Special Military Tribunal, therefore, fulfills the need of having general officers and their immediate accomplices judged by their peers. This single exception to the principle of the equality of all before the law <sup>44</sup> is clearly justified: the desire is to avoid the possibility that those who are charged with vast responsibilities in the Army will be judged by men who are issued from the ranks and who often have only an imprecise idea of the **work**, responsibility and necessities of high command. On the other hand, the hierarchical principle, which underlies all military life, is respected. Finally, this method avoids, for a certain category of crimes, the divulging of national defense security information outside of the circles that require such knowledge. However, it might appear that in certain respects general officers enjoy fewer rights than other members of the armed forces. Members of the Special Military Tribunal would not necessarily be persons who are thoroughly familiar with judicial practices, as is the case with the division tribunal judges, and, additionally, the composition of an *ad hoc* tribunal could present some danger of partiality. Another disadvantage is that no appeal may be taken from the decisions of this court, although this matter might be solved by a simple reform. However, the right to appeal in these cases would conflict with the hierarchical principle of the army, *i.e.*, a judgment

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<sup>44</sup> Article 4 of the Swiss Constitution is worded as follows: "All Swiss are equal before the law. There are in Switzerland neither subjects, nor privileges of station, birth, of **persons** or of families."

## MILITARY LAW REVIEW

rendered by general officers should not be reviewed by officers, the highest-ranking of whom is a colonel. Moreover, the presence on the Special Military Tribunal of three colonels of the Military Justice Corps (high judges or former high judges or members of the Military Supreme Court), accustomed to the exercise of independent judgment, constitutes a sufficient guarantee of impartiality.

### 6. *Role of the Chief Prosecutor*

The Chief Prosecutor combines several roles. He functions as a prosecutor before the Special Military Tribunal and represents the public before the Military Supreme Court (Art. 27, OJPPM). He is also placed at the head of the Military Justice Corps which he directs and supervises, under the control of the Federal Military Department. He is the immediate superior of prosecutors and trial judges (Art. 25, OJPPM). However, he exercises no command influence on the decisions of the tribunals, which function in complete independence.

### C. *THE DEFENSE*

Although the existence of a military justice system is essential to the national security, it is important not to forget that the system might present dangers to the accused who are brought before its bar of justice. In effect, while in the army, a hierarchical society, an accused might feel oppressed, and might not dare to oppose the statements and orders of a superior, and therefore find himself rather defenseless before the prosecutor and judges. In this jurisdiction, therefore, the defense has a particularly important role and its presence is essential for the avoidance of parodies of justice. Therefore, the Swiss legislators have provided that the presence of a defense counsel is mandatory before the judging authority (Arts. 126 and 139, OJPPM), and his absence constitutes a cause for nullifying the judgment.

However, this rule does not affect the accused's right to choose freely his own defense counsel. Under the terms of Article 107, OJPPM, the accused has the right to be assisted by "a soldier or, by a Swiss citizen, enjoying full civil rights, who is not in the military service." Whereas in ordinary criminal procedure, as a general rule, only attorneys may appear as defense counsel, in military justice any citizen may accept this responsibility. This conception is at once a consequence of the system of an army of militia and the reflection of the accused's need for a counselor knowing the necessities of military life or human reactions in the face of service obligations.

If the accused does not choose his own defender, the presiding judge designates one for him, before the beginning of the criminal

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instruction (magistrate's hearing) (Art. 126, OJPPM). But, if the crime being investigated is of a serious nature, the presiding judge may order representation for an indigent accused during the initial investigation itself (Art. 107, para. 2, OJPPM).<sup>45</sup> Each officer of the division to which the tribunal pertains must, if he is an attorney, accept this responsibility (Art. 126, para. 3, OJPPM).

The defender may therefore intervene during the initial investigation. He may petition to the examining magistrate regarding measures taken during the investigation, and he may be authorized by the magistrate, providing the investigation's purpose is not compromised thereby, to become familiar with the facts, to assist in the examination of witnesses, and to take part in on-site inspections. However, the magistrate may limit or refuse the defender the right to communicate with the accused who is in preventive detention, if this is justified by the nature of the investigation. However, at the end of the investigation, the defender becomes fully aware of the facts and may freely consult with the accused (Art. 107, OJPPM).

Beginning with the criminal instruction (magistrate's hearing), the defender may present his eventual grounds of exception, and he may announce before the audience the methods of proof which he proposes to employ (Art. 126, para. 4, OJPPM). He has the right to be present at depositions of witnesses who will not be able to be present for the hearing, as well as on-site inspections which the Chief Justice may order before the trial itself begins (Arts. 131-133, OJPPM). At the trial he may, like the prosecutor and the judges, pose additional questions to the accused, to witnesses and to experts (Arts. 145-147, OJPPM). Then, after the findings, he presents the accused's defense (a discussion of culpability and plea on the sentence). He has the right to respond to the prosecution's rejoinder (Art. 155, OJPPM).

These rules are equally applicable before the division tribunals, before territorial tribunals, and before the Special Military Tribunal.

Finally, the defender has the right to appeal to the Military Supreme Court.

## V. CONCLUSION

The purpose of this article has been, in these few pages, to show the character of Swiss military justice, with emphasis on its relationship to the particular structure of the Confederation and to the original system of its army of militia.

As in the case with all human institutions, Swiss military justice is periodically the subject of criticism and of propositions for reform

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<sup>45</sup> Federal Council's Order Assuring the Execution of the Military Penal Code and the Law Concerning the Organization of the Judiciary and Criminal Procedure for the Federal Army, art. 6 (May 15, 1951).

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which, more often than not, are revealed to be inadequate or inopportune, or which reflect a passing tendency in response to a particular case. A popular referendum which would have abolished military tribunals altogether was defeated in a move after World War I. Several years ago there was a movement to introduce an appellate procedure, but this idea has not been followed. One of the arguments in opposition to this plan was that since the jurisdiction of the court would exceed that of the army unit (the division), the contact between the judge and the accused would be broken, and the understanding that the members of the tribunal must have of the habits, customs, reactions, and character of those whom they judge would cease. The proposed institution would therefore have conflicted with the federal nature of the nation.

If the Swiss military justice system has been able to maintain itself without great change since 1889, it is because it has become ingrained into the customs of the people, and because it fulfills the functions which are expected of it. Men know the procedural guarantees which the law accords 'them';<sup>46</sup> they know that those who will judge them will always have a state of mind similar to that of civilian judges,<sup>47</sup> and that they will act in complete independence.<sup>48</sup> It is this guarantee of objectivity and impartiality which gives to Swiss military justice its stability and perennity.

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<sup>46</sup> The protection of the accused is assured in a precise manner. Thus, in addition to the provisions relating to the choice and presence of a defense counsel, Article 78, OJPPM, provides that "with the exception of the dispositions contained in this title, no coercion of an accused may be exercised," and "capricious questions, allegations of assumed facts and threats are forbidden during the investigation."

"By reason of the militia system, the tribunal is in reality like a civil tribunal when not engaged in periods of active service; the judges, in effect, enter into the service specially in order to fulfill their functions. They present themselves therefore with a free, almost civilian state of mind; there are amongst them no career soldiers, but they present themselves as soldiers, aware of their responsibilities, but free from the outlook of the professional soldier.

<sup>48</sup> In order to safeguard that independence, a rule of customary law provides that the deliberation take place in inverse grade order, the judge of least rank exposing his point of view the first, and the presiding judge (a colonel or lieutenant colonel) speaking last; however, due to a practice issued from the rules which were current in the regiments which were in service abroad, there are no different ranks amongst the members of the tribunal; all of the judges are of equal rank, even if they wear—contrary to the provisions of the Caroline—the insignias of their rank, and the presiding judge is but the *primus inter pares*. Equality is again reinforced by the deposit of a special pay account for all.

## COMMENTS

**INTERROGATION UNDER THE 1949 PRISONERS OF WAR CONVENTION,\*** With the coming into force of the 1949 Geneva Prisoners of War Convention,<sup>1</sup> and its subsequent ratification by the United States; the United States and other signatory states bound themselves to protect certain rights of "captured personnel" <sup>2</sup> in time of war. The Convention permits an individual prisoner to refuse to divulge more than name, rank, serial number and date of birth to his captor.<sup>4</sup> This individual right is at times in direct conflict with the tactical military needs of a detaining power to extract from its prisoners vital and life-saving intelligence. The particular problem raised by this manifest conflict of interest is: what limitation does the Convention of 1949 place on the detaining power's military interrogators in order to protect the individual prisoner's right to give only name, rank, serial number, and date of birth? This article will critically examine the Geneva Prisoners of War Convention and the present practices which nations bound by the Convention use in interrogating prisoners of war. An attempt will be made during this examination to fashion several intelligible rules which would protect the rights of prisoners of war and at the same time fulfill the detaining power's military need for tactical information.

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\*The opinions and conclusions presented herein are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

<sup>1</sup> Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (1956), 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (hereinafter cited as GPW).

<sup>2</sup> The United States was a party to the Geneva Convention of 1929 and became a signatory to the Conventions of 1949. "The Convention was observed by the United States during the Korean Conflict, although the date of its entry into force for this country was delayed until February 2, 1956. U.S. DEP'T OF ARMY PAMPHLET No. 20-151, LECTURES ON THE GENEVA CONVENTIONS OF 1949, p. 1 (1958) (hereinafter cited as FM 27-10). Observances of the Conventions by American military and civilian personnel warrant equal respect for both the letter and spirit of the law as required by the Constitution of the United States. U.S. CONST. art. VI, § 2, FM 27-10, para. 7.

<sup>3</sup> U.S.T. & O.I.A. 3316 at 3320, T.I.A.S. 3364 (1949). In this convention it was decided who would be considered as "Prisoner of War" for purposes of determining who would be entitled to the protection granted by the convention. See art. 4, T.I.A.S. 3364. In this article the terms "captured personnel" and "prisoner of war" are used interchangeably to mean persons who are protected by the convention by qualifying as a "Prisoner of War" within the meaning of article 4 of the Prisoners of War Convention. Hereinafter cited as GPW.

<sup>4</sup> GPW, art. 17.

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### I. ARTICLE 17 OF THE 1949 PRISONERS OF WAR CONVENTION

The *only* section of the Prisoners of War Convention actually dealing with the interrogation process itself is Article 17 which prescribes both the information which a prisoner must give and the scope of an answer to any queries from the captor :

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first name, and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status. . . . No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind. . . . The questioning of prisoners of war shall be carried out in a language which they understand!

This provision is applicable to prisoners of war from the time they fall into the power of the enemy until their final release and repatriation.<sup>6</sup> Classifications of those persons termed "prisoners of war" as defined by the Convention include members of the armed forces, militias, support personnel, maritime crews, and resistance movements.<sup>7</sup> As the Prisoners of War Convention applies only to military prisoners, civilians must look elsewhere for protection against coercion by the captor in order to elicit information.<sup>8</sup>

Historically, Article 17 can be traced to the time of the War between the States and Lieber's Code,<sup>9</sup> which stated that:

Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners, in order to extort the desired information, or to punish them for having given false information."

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<sup>5</sup> *Ibid.*

<sup>6</sup> GPW, art. 5.

<sup>7</sup> GPW, art. 4.

<sup>8</sup> The protection against coercion for civilians not qualifying as PW's is afforded by Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (1956), 6 U.S.T. & O.I.A. 2516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Article 31 states: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties." Apparently, this can be held to mean that civilians need not render any information, whereas the military prisoner must give his name, rank, serial number, and date of birth.

<sup>9</sup> Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100, War Dep't (April 24, 1863) (hereinafter cited as Gen. Orders No. 100, art. —). This is generally referred to as Lieber's Code in reference to its author.

<sup>10</sup> Gen. Orders No. 100, art. 53.

It appears that the underlying intent of this provision was not only to protect prisoners against coercion but also to appeal to their ideals in order to discourage them from giving information to their captor. The tenor of the times was expressed in the epithet "honorable men." With this new protection afforded by the law of war, an officer or an enlisted man who gave his captors military information was truly regarded as a deliberate traitor.<sup>11</sup> This prohibition against violence to prisoners in the interrogation process served as a precedent for the 1907 Hague and 1929 and 1949 Geneva Conventions.

Article 17 is expressly calculated to prevent the use of "physical or mental torture" or "any other forms of coercion" that might be employed in interrogation. To appreciate fully the wide scope of Article 17, it is necessary to compare it with its predecessor, Article 5 of the Convention of 1929, which provided: "No coercion shall be used on prisoners to secure information relative to the condition of their army or their country."<sup>12</sup> The drafters of the 1949 Convention, fearing a repetition of practices that occurred in certain interrogation camps during World War II, extended the scope of the prohibition by replacing the word "coercion" with the more comprehensive phrase "physical or mental torture nor any other form of coercion." Further, the success of Detaining Powers in World War II in obtaining by coercion information from prisoners, not about military matters, but about their personal backgrounds, or those of their relatives and associates, led to still another extension of the law. The 1949 text was, as a consequence, drafted to embrace "information of any kind whatever." The *travaux préparatoires* of the Convention even confirm that the signatories intended by the language (of Article 17) to prohibit all forms of coercion and treatment designed to obtain any information whatsoever, including that which a prisoner is required to give by the first sentence of Article 17.<sup>13</sup>

A further analysis of the first sentence of Article 17 discloses that it is concerned with what a prisoner is bound by international law to divulge; his refusal to give the required Article 17 information may result in a commensurate loss of privileges. However, the remainder of the article in no way prevents the prisoner from volunteering fur-

<sup>11</sup> The concept of treason expressed above in Lieber's Code can be viewed on a case by case basis in the treason trials following each major conflict since the Civil War. See Gen. Orders No. 100, arts. 80, 98 (1863); FLORY, PRISONERS OF WAR 94 (1942); also see article 104 of Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1958) (hereinafter cited as UCMJ, art. —) and its forerunners under the Articles of War, from 1774 to the present.

<sup>12</sup> Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021; IV MALLOY, TREATIES 5224.

<sup>13</sup> JAGW 1961/1157 (June 1961). Also see DRAPER, THE RED CROSS CONVENTIONS 59 (1958). The commentary here, in using the term "must refrain" is dealing with the captive's municipal duties rather than his international duty.

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ther information. It is in this area that the sheer persuasive powers of the interrogator are brought into play. Article 17, therefore, does not protect the prisoner against the wiles and cunning of enemy interrogators, for there is no specific admonition against the mere asking of questions beyond name, rank, serial number and date of birth. The prisoner is only protected from any "physical or mental torture" and "any . . . form of coercion . . . inflicted . . . to secure . . . information of any kind whatever."<sup>14</sup> Thus, Article 17 serves to protect the prisoner from yielding to a temptation to divulge information due to fear of pain and to p a r d the prisoner from other external pressures. Pictet goes further by expressing the prisoner of war's duty to his country as follows: "The prisoner may, indeed must, refrain from giving military informntion to the Detaining Power; he must therefore be protected against any inquisitorial practices on the part of that Power."<sup>15</sup>

It is clear that an interrogator can legitimately ask questions beyond the scope of the information required by Article 17. The problem is not the questions asked, but the method used or the circumstances surrounding the questioning. Therefore, Article 17 should not be construed to prohibit any questioning by an interrogator; such a misinterpretation would put him in an unnecessary dilemma, and would tend to subject his profession to the danger of substantial violations of the law inherent in any thought-to-be unlawful undertaking. Consequently, eliciting information by questions in the absence of threats or coercion is an art every interrogator of prisoners of war must learn in order to take full advantage of the permissible scope of Article 17.

### 11. THE LEVELS OF INTERROGATION

Intelligence doctrine teaches that technically there are two levels of interrogation below the national level: the strategic level and the combat level.<sup>16</sup> The strategic interrogator operates on the highest level of the inquisitorial process, and upon his efforts the outcome of a whole war might easily depend. He deals with high ranking prisoners both military and civilian. At the strategic level, the interrogator must possess highly developed inquisitorial skills to meet successfully the many problems of strategic questioning. The skilled strategic interrogator has but one purpose: to extract all information of any nature from his subject. At this level, or any level, direct coercion as

<sup>14</sup> GPW, art. 17.

<sup>15</sup> PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 156 (1960) (hereinafter cited as *Commentary*). See also JAGW 1961/1157 (June 1961).

<sup>16</sup> U.S. DEP'T OF ARMY, FIELD MANUAL SO. 30-5, COMBAT INTELLIGENCE, PARAS. 6.7 and 8 (1960).



a vehicle for obtaining information is not only illegal,<sup>17</sup> but untenable as well.<sup>18</sup>

The combat interrogator works in the front lines and has a mission of extracting information of immediate tactical importance concerning the opposing force. The problem at the combat level is the lack of time to engage in a softening process, because at this level the prisoner has information of enemy operations currently in progress, and unless such information is acquired immediately, it is valueless. Combat intelligence fulfills the field commander's perpetual need to keep informed of enemy movements in order to protect his troops from imminent danger. Thus, the combat interrogator usually has the single mission of acquiring military intelligence immediately needed by field commanders.

At the combat level the use of physical coercion such as slaps, kicks, unmaterialized threats, twists of arms, and other minor humiliations, none of which are injurious to the prisoner's health or welfare, are on occasion used without detection. At this level or at any other level, such devices are not only contrary to the proscriptions of Article 17, but are unwarranted, and result only in showing a lack of professional skill on the part of the interrogator. Such actions only bring discredit upon the Detaining Power and create the possibility of criminal liability upon the individual interrogator. Even at this level, interrogation by a skilled interrogator can be as successful, or more so, than the

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<sup>17</sup> GPW, arts. 13, 129, 131, 132. Although the Convention prescribes personal liability for violations, it fails to spell out exactly how the liability attaches. Whether jurisdiction properly takes effect within the prescribed limits of the Nuremberg Charter or is confined solely to the executory provisions of the Convention punishable by appropriate municipal laws is not clear. Violations of international law by private individuals have customarily been regarded as acts constituting individual criminal liability which a belligerent nation may prosecute through its national military tribunals. Interrogators who violate article 17 may find themselves incurring criminal liability as war criminals. "Professor Quincy Wright suggests a code defining as concretely as possible the various crimes against prisoners of war." FEILCHENFELD, *PRISONERS OF WAR* 91 (1948). Charter of the International Military Tribunal Annexed to the London Agreement of August 8, 1945, T.I.A.S. No. 2420, art. 6. For a further elaboration of the problem see George Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT'L L. 407-435 (1943); Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, BRIT. Y'RB'K INT'L L. 58-95 (1944); Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CALIF. L. REV. 530 (1943).

<sup>18</sup> Such actions are untenable not only because of personal criminal liability attached but because of the direct discredit such actions could bring on the United States. The appropriate penal provisions of the UCMJ (art. 118, murder; art. 119, manslaughter; art. 124, maiming; art. 128, assault; art. 93, maltreatment of a person subject to one's orders; art. 134, conduct bringing discredit upon the armed forces) would be applied if trials were conducted by the United States of interrogators alleged to have committed offenses against prisoners.

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use of force in acquiring necessary tactical intelligence. Lack of time does not justify the abandonment of artful interrogation utilizing techniques within the permissible scope of the Convention.

At the combat level, it is the interrogator's mission to extract any intelligence which will aid pending military operations. To accomplish this mission, one of the first rules the interrogator should learn is to view his subject as a soldier who by his very training is qualified to report on some aspects of enemy activities. Any personal information the military interrogator can possibly learn about the prisoner will enhance the quality of his questioning and ultimately lead to the success of the interrogation. In this regard a thorough search of the prisoner prior to interrogation is permissible. Anything that would aid the interrogator in formulating his questions is removed from the prisoner's person.<sup>19</sup> Also, before questioning, the interrogator is briefed on the tactical situation<sup>20</sup> in order to acquaint him with the intelligence needs of the field commander.<sup>21</sup>

Another permissible technique the interrogator can use to accomplish his mission is the mechanical processing of the prisoners. The process should be set up to take full advantage of a prisoner's personal and emotional fears from the moment of capture until repatriation. Such a process might include some of the basic procedures discussed below.

Immediately upon capture a brief interrogation should take place so as to capitalize fully upon the shock effect produced by the capture. Sudden removal from the heat of battle coupled with direct exposure to the enemy has an obvious psychological advantage for the captor. There is no discernible duty under the convention for the captor to reassure, calm, or put an enemy captive at ease. Interrogation at this

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<sup>19</sup> Art. 18, GPW, provides that personal articles must "remain" in a prisoner's possession. It would appear that as long as the objects are only removed for short temporary periods such removal would not violate art. 18. This reasoning is reinforced by the fact that art. 18 also allows currency to be taken and returned. This interpretation would allow the removal of all personal articles long enough for a careful examination in order to evaluate them for intelligence data. All personal articles must be returned to the prisoner in order to avoid violating art. 18.

<sup>20</sup> U.S. DEP'T OF ARMY, FIELD MANUAL No. 30-15 (C), INTELLIGENCE INTERROGATION (U), 1961; U.S. DEP'T OF ARMY, FIELD MANUAL NO. 19-40, HANDLING PRISONERS OF WAR, (1952); U.S. DEP'T OF ARMY, FIELD MANUAL No. 30-5, COMBAT INTELLIGENCE (1960). Several school manuals of interest in the area are: IF 65050, U.S. Army Intelligence School, Fort Holabird, Maryland, "The Handling of Prisoners of War," (July 1962); IF 63011, U.S. Army Intelligence School, Fort Holabird, Maryland, "Prisoners of War for Intelligence," (November 1959).

<sup>21</sup> Specific questions about the enemy that might well be answered by interrogation include: (1) location and identity of front line troops and supporting weapons, (2) location of reserves, (3) personalities, (4) fortifications, obstacles, destruction, (5) supply, (6) morals, (7) terrain, (8) effectiveness of our counter-intelligence. IF 66011, *op. cit.*, *supra* note 20.

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point is of a preliminary nature and takes place before even a brief evacuation. Such an interrogation would not be contrary to the provisions of Article 19 of the Convention which requires evacuation of prisoners “. . . as soon as possible after their capture . . .”, because it would normally be conducted while others are arranging for transportation and guards and attending to other details of the evacuation.<sup>22</sup> There is no provision in Article 19 which specifically forbids interrogation at this point.<sup>23</sup>

The first interrogation is normally restricted to information which is related to the requirements of current military operations. This initial interrogation usually **takes** place at division level where complete facilities are generally in existence. Following this interrogation the majority of prisoners are funnelled to army prisoner of war cages for internment. In certain cases further interrogation may be warranted at corps level.<sup>24</sup> Certain prisoners will be selected on the basis of their qualifications for strategic interrogation at various higher echelons. Throughout the entire interrogation process, all information of a personal nature learned about the prisoner is put into the prisoner's personal file to be used in classifying him. Prisoners, as a matter of form, are classified in this order: officers, noncommissioned officers, privates, deserters, civilians, females, and political indoctrination personnel.<sup>25</sup> When applicable, however, classification of prisoners may be determined in accordance with their potential value to the intelligence effort. Classification and segregation are legitimate administrative procedures which may be used with a view toward gaining intelligence. Such segregation is within the permissible limits of Article 22 of the Convention so long as prisoners are not separated from the armed forces with which they were serving at the time of capture.

Since the segregation of prisoners in this manner is legal, and since segregation on the basis of political philosophy would be useful to the interrogator, it is submitted that prisoner classification should undergo considerable alteration to separate: (a) hard core Communists, (b) probable pro-Communist, (c) non-political personnel,

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<sup>22</sup> GPW, art. 19. This article provides that prisoners not only be removed from the combat zone but also far enough for them to be out of danger. If there is no danger in the area to which they have been moved they may be retained there for questioning. IF 65050, *op. cit. supra* note 20.

<sup>23</sup> PICTET, COMMENTARY, *op. cit. supra* note 15, at 171-172. This section of the Commentary pertinent to evacuation mentions nothing as to the feasibility of interrogation beforehand.

<sup>24</sup> IF 68050, *op. cit. supra* note 20. Two reasons for interrogation at corps level are: (1) specific corps requirements are within the realm of a prisoner's knowledge or (2) capture was made by corps troops.

<sup>25</sup> GPW, arts. 44, 45, gives some basis for classification according to rank. The other classifications follow logically.

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(d) potential or probable anti-Communists, and (e) political defectors.<sup>26</sup> Early interrogation for the purpose of establishing the prisoner's attitude would afford necessary data on which to base this division.<sup>27</sup> Screening camps could be used for purposes of classification and segregation providing they meet minimum prescribed conditions and in particular afford treatment commensurate with that in other camps.<sup>28</sup>

While the needs and methods used at the national, the strategic and combat levels vary widely, the criterion used to determine the legality of the methods is the same—the Geneva Convention. Thus, the paramount question at all levels of interrogation is whether a particular *modus operandi* violates the standards of Article 17. It won't in the hands of a skilled interrogator; it may if left to the devices of the unskilled.

### 111. THE TECHNIQUES OF INTERROGATION

Questioning and physical surroundings are mutually dependent factors, and both must be examined in each case to determine if there is a violation of Article 17. In many cases the distinction between legal and illegal questioning may be determined by extrinsic factors not directly related to the questioning itself. For example, to interrogate subtly a hungry prisoner outside a mess hall would probably not contravene Article 17; however, if all other prisoners were fed and the one being interrogated was not, the action would be illegal because it would expose him to what Article 17 terms "unpleasant and disadvantageous treatment." Thus, under the provisions of Article 17, one principle which can be used to determine the legality of an interrogator's action is whether or not a particular prisoner was treated less favorably than the others in order to pressure him into giving military information.

This does not mean that as long as an action is taken towards a group of prisoners as a whole it is legal. It is obvious that actions towards an entire group which amount to physical or mental torture, or overt coercion, would violate Article 17; however, unless it violated another Article of the Convention, any action toward an entire group of prisoners which falls short of "mental or physical torture . . . or . . . any other form of coercion" would be permissible, even though

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<sup>26</sup> Meyers & Bradbury, *The Political Behavior of Korean and Chinese Prisoners of War in the Korean Conflict: A Historical Analysis*, George Washington University Human Resources Research Office Technical Report 50, pp. 15-16 (August 1958).

<sup>27</sup> This would be the only efficient means of acquiring such data. Such interrogation seems permissible within the purview of the Convention as long as no art. 17 violation is committed,

<sup>28</sup> GPW, art. 24.

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the only design is to elicit intelligence. For example, if an entire group of prisoners were told that any individual who "talked" would be given a parole, such enticement would not be coercion and thus not violative of Article 17. However, if the prisoners were detained close to the front line in a danger area and were told that only those who cooperated with the interrogator would be evacuated both Article 17 and Article 19, the latter which requires the evacuation of prisoners of war from the front line danger areas "as soon as possible," would be violated.

While prisoners of war are entitled to certain rights as a matter of law and are entitled to be treated humanely as a matter of morals, it must be remembered that prisoners are captured soldiers and mature men accustomed to strict discipline and the rigors of military life. In such a life minor physical discomforts are not only permissible but are to be expected. The problem is at what point physical discomforts cease to be minor and become illegal coercion. This presents a question of fact which must be determined separately in each case. It is clear that some minor physical discomforts applied to all prisoners will not necessarily violate Article 17.

Some of the permissible physical discomforts might include the practice of making all prisoners stand during their interrogation or sit in an uncomfortable chair. Likewise, the use of bleak surroundings, such as a dimly lit room or an unusually bright one, could legitimately be employed as psychological weapons in the battle for military intelligence. These variables would comprise only a deprivation of ordinary luxuries of civilian life and thus would not be acts of overt coercion. Also, harsh tones of voice, a system of reward for cooperation, etc., are all devices which amount to nothing more than psychological cleverness in the age old art of interrogation. It must be noted, however, that "minor physical discomfort" encompasses only a lack of luxury, not deprivation of basic human needs, and certainly not any form of physical violence or threats.

Besides the use of physical coercion, Article 17 has new vistas to protect, due to the new developments<sup>29</sup> in scientific methods of manipulating human behavior. The use of truth serum in prisoner of war interrogation has already come to the attention of military authorities. In an opinion by The Judge Advocate General of the Army reviewing the employment of such a chemical in the light of Article 17, it was noted that Article 17 justly and logically must be extended to protect the prisoner against any inquisitorial practice by his captors which would rob him of his free will. On this basis it was held that the use of truth serum was outlawed by Article 17. In addition, its

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<sup>29</sup>THE MANIPULATION OF HUMAN BEHAVIOR (Biderman & Zimmer eds. 1961).

## MILITARY LAW REVIEW

use contravenes Article 18, which states in part : “. . . no prisoner of war may be subject to . . . medical or scientific experiments of any kind which are not justified by the medical, dental, or hospital treatment of the prisoner concerned and carried out *in his interest*.” (Emphasis added.) The opinion declared that “. . . the suggested use of a chemical ‘truth serum’ during the questioning of prisoners of war would be in violation of the obligations of the United States under the Geneva Convention Relative to the Treatment of Prisoners of War.”<sup>30</sup> From this opinion it seems clear that any attempt to extract information from an unwilling prisoner of war by the use of chemicals, drugs, physiological or psychological devices, which impair or deprive the prisoner of his free will without being in his interest, such as a bonafide medical treatment, will be deemed a violation of Articles 13 and 17 of the Convention.

The interpretational problems involved in deciding whether a physical discomfort or scientific method can be used at any level of interrogation without the commission of an illegal act is perhaps best avoided by the use of the soft, persuasive technique. While the use of certain other devices may in some cases be justified by battlefield necessity, and legal within the framework of the Geneva Convention, it must be realized that the so-called “persuasive interrogation” in the hands of a skilled craftsman usually is as effective as any other and in numerous cases has obtained better results. One example of such a craftsman was Hanns Joachim Scharff.

Scharff was a German interrogator stationed at Auswerstelle West, Oberusel, Germany, during World War 11. Of the five hundred aviators questioned by him, only a handful persisted in silence. Kindness was his *forte* to such an extent that prisoners were actually caught off guard. A normal interview commenced by offering the prisoner a chair and a cigarette. After answering the routine name, rank, and serial number questions, the prisoner would remain silent. Scharff would proceed :

“That number of yours. Are you a bomber? Or a fighter pilot?” No answer.—“What is your home address, Lieutenant?”—No answer.—“What type of plane do you fly?”—The Lieutenant grins and shakes his head. Scharff chuckles. “I see I can’t get anything out of you. Here take a look at the latest *Stars and Stripes*. I’ll be back in a few minutes.”<sup>31</sup>

<sup>30</sup> JAGW 1961/1157 (June 1961).

<sup>31</sup> *Report of the Secretary of Defense's Advisory Committee on Prisoners of War. POW: The Fight Continues after the Battle* 52. 59 (August 1955) (hereinafter cited as Defense Advisory Committee Report). Composed of ten members, both military and civilian government officials, this Committee was appointed on May 17, 1955, to provide a code of conduct for the Armed Forces of the United States. The Report contains a short but accurate picture of the history of prisoners of war and critically evaluates the contemporary status of American prisoners of war in terms of all historical precedents.

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With the chair, cigarette, and *Stars and Stripes* serving as instruments of the interrogation, the prisoner was placed at ease. Scharff, maintaining the initiative, then contacted **BUNA**, an information gathering center which compiled dossiers from bits of intelligence data recovered from downed pilots. These data would normally include such items as ticket stubs, book matches, coins, maps, photos, ID cards, newspaper clippings, etc. The next move was deceptively simple; upon returning, Scharff would say :

Well, Bud, you see I have found you out. You flew over here in a P-38. Your squadron commander, Jack Williams, is in prison down the line. He's a nice guy. I couldn't get anything out of him, but my intelligence boys came across a news clipping. You fellows flew in here from Tunbridge Wells. . . . By the way, how's your little sister, Peggy? We've got a chap in my outfit who used to live in Oak Park.<sup>32</sup>

The procedure might not always have been so easy, but with such a routine a prisoner could rarely retaliate. The degree of intimacy that Scharff conveyed was found to be the most disarming feature of his technique. It did not have to be formal—the indifferent interrogation was carried on in circumstances such as a stroll through the park or over a beer in a local beer garden. If the prisoner still resisted, a pill was clandestinely dropped into his glass. In ten minutes he became very sick, but unbeknown to him the illness was only temporary. As the prisoner folded in pain, the interrogator became most solicitous: "Lieutenant, you must be ill. Surely you will want to notify your next of kin!" Still, a prisoner might remain defiant. If so, he was returned to his cell where a pleasant cellmate from Ohio greeted him: "Did they sweat you out?" The prisoner might nod grimly, "Yes, but they couldn't get General Jones' name out of me." A concealed microphone had the name now, or perhaps the pleasant cellmate was really an enemy plant.

In this manner, Scharff successfully tricked his victims. There was no torture with thumbscrews, cigarette burns, or dripping water. Prisoners were defeated by a clever stagecraft of wit and congeniality. Scharff, in this respect, may be compared to any number of interrogators, enemy or American, who pursue their tasks lawfully, yet cunningly, at all times draining information from prisoners whose knowledge could save a platoon, a battalion or a division from destruction.

Except for the use of the "pill"<sup>33</sup> there was nothing offensive, cruel, or inhuman about Scharff's methods. Unless the questioning was unduly extended in time it would be difficult, if not impossible, to find

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<sup>32</sup>*Id.* at 60.

<sup>33</sup>This is the only procedure in Scharff's method that would be violative of Article 17 as it involves a physically definable deprivation of free will.

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that physical or mental torture or coercion in any form<sup>34</sup> was exerted on the prisoner by Scharff's methods. Excepting the use of drugs, such methods of interrogation, while they obtain the needed intelligence, are still substantially within the scope of Article 17. Thus, the value of and the need for trained interrogators who can, by either persuasion or the use of other legal devices, or both, gain the intelligence vital to success in battle can be clearly seen.

### IV. CONCLUSION

Today, wars are fought not only for the annexation of territories, and for political and economic reasons, but also for the minds of men. In this area of the Cold War, the United States has been forced into ideological warfare. In such warfare the United States must have interrogation personnel trained in the requirements of the 1949 Geneva Convention for the Protection of Prisoners of War.

Article 17 raises PW interrogation to the level of a science and demands highly skilled personnel. In this age of ideological warfare it leaves no room for the interrogator whose sole qualification is that he speaks a foreign language. He must not only be skilled, but also well informed and be able to accomplish his mission within the rule of law.

STANLEY J. GLOD\*

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<sup>34</sup> GPW, art. 17, does not cover situations where deceit and trickery are employed in interrogation. The text prohibits "mental torture." The normal ruses associated with this type of interrogation are not violations of the Convention according to present interpretation of the text. This interpretation of article 17 is affirmed by the accepted use of "ruses" provided for in FM 27-10, *op. cit.* **supra** note 2, §§ 48, 50, 51, which state in part that "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible." Accord *Hague Convention III*, Convention Respecting the Laws and Customs of War on Land, and Annex, art. 24 (October 18, 1907), 36 Stat. 2277, T.S. No. 539. Dictum in the Killinger Case. 3 WAR CRIMES REPORTS 67 (1948), indicates that obtaining information by a trick or ruse is not a violation of the Geneva Convention. Interrogating a wounded prisoner was held not violative unless it could be shown that such interrogation amounted to what might be considered as physical or mental ill-treatment.

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**ONE HUNDREDTH ANNIVERSARY OF THE LIEBER CODE.\*** This year marks the one hundredth anniversary of the first attempt by a national army to codify the laws and usages of war.<sup>1</sup> This endeavor, the Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (April 24, 1863),<sup>2</sup> has become known as the Lieber Code in honor of its principal draftsman, Dr. Francis Lieber. This historical notation is well known by students and practitioners of military law and the law of nations. The author himself, and some details of the genesis, scope and influence of the Lieber Code remain more enigmatic. These penumbrae will be examined with the thought that they may suggest an approach to some of the problem areas of the laws and customs of war today.

## I. THE AUTHOR

Francis Lieber<sup>3</sup> was born in Berlin, Germany, on March 18, 1800. As a child, he witnessed the entry of Napoleon into Berlin after the victory at Jena. At the age of fifteen, during the Hundred Days, he enlisted in the Colberg Regiment and fought under Blücher at Waterloo. During the Battle of Namur he received serious wounds and was left for dead on the battlefield.

Lieber's young adulthood in Prussia illustrates the dilemma of a student influenced by the ideals of the French Revolution at a period when his homeland was a center of political reaction. Following the conclusion of the Napoleonic Wars, Lieber was imprisoned at the age of nineteen for four months for belonging to a liberal patriotic society. Upon his release from prison, he was forbidden to study at any university except the University of Jena. This order effectively barred him from any hope of advancement in his native Prussia. Lieber received the degree of Ph. D. from Jena in 1820, and then was forced to leave Jena. He studied further at Halle and Dresden, and was a brief participant in the Greek War of Independence. He made his way to Rome, where his learning and misfortunes secured him the position of tutor in the household of Niebuhr, the Prussian Ambassa-

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\* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

<sup>1</sup> II OPPENHEIM'S INTERNATIONAL LAW 228 (Lauterpacht ed. 1962).

<sup>2</sup> Contained in app. to The Judge Advocate General's School Special Text No. 7, *Law of Land Warfare* 155-186 (1943) (hereinafter referred to as the Lieber Code).

<sup>3</sup> See, generally, "Francis Lieber," XI DICTIONARY OF AMERICAN BIOGRAPHY 236-238 (1933).

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dor. Upon returning to Berlin in 1823, Lieber studied mathematics, but he was arrested the following year on charges of political disaffection, threatened with imprisonment for life, and finally, upon the intercession of Niebuhr, he was released after a confinement of six months. In 1826 Lieber made his way in secret to England, and made a precarious living there teaching languages. The next June found him in the United States.

Dr. Lieber's career in the United States, even as a young man, was one of distinguished accomplishment. He became a naturalized American citizen shortly after his arrival here. He devised a plan for the publishing of an encyclopedia, and he became the founder and first editor of the *Encyclopedia Americana* (1829-1833). His work with the *Encyclopedia Americana* brought him into contact with many of the leading Americans of his time. It also secured for him the position of Professor of History and Political Economy at South Carolina College (now the University of South Carolina), from 1835 to 1857. From 1857 to 1865 he was Professor of Modern History and Political Science at Columbia College, New York. He transferred to the Columbia Law School in 1865, and until his death on October 2, 1872, Dr. Lieber taught International Law, Civil and Common Law there.

The American Civil War struck Lieber, as it did many Americans, as a personal tragedy. His three sons fought in the conflict. Oscar Montgomery Lieber eventually died of wounds received while fighting for the Confederacy. Hamilton Lieber, A Union volunteer, lost an arm at Fort Donelson. Guido Norman Lieber fought in the Union infantry. During the Spanish-American War, Brigadier General Guido Lieber served the United States as The Judge Advocate General of the Army.<sup>4</sup>

### 11. THE CODE

Dr. Lieber's *Encyclopedia Americana*, together with his *Political Ethics* (1838) and *Civil Liberty and Self Government* (1853) had assured him a wide reputation by the outbreak of the Civil War.<sup>5</sup> During the early stages of that conflict, vast armies were recruited who were commanded in large part by officers who were not professional soldiers. Their unfamiliarity with the laws and customs of land warfare was heightened by the fact that no uniform treatise was readily accessible for their guidance, and no orders defining the law

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<sup>4</sup>Fratcher, *History of The Judge Advocate General's Corps, United States Army*, 4 MIL. L. REV. 89, 99 (1959).

<sup>5</sup>Judge Story's opinion of POLITICAL ETHICS was that ". . . it constitutes one of the best theoretical treatises on the true nature and objects of government which has been produced in modern times. . . ." Root, *Francis Lieber*, 7 AM. J. INT'L L. 453, 461 (1913).

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of land warfare had ever been issued. In order to minimize the unnecessary and illegal cruelty attending the hostilities, a guide to the rules of land warfare was imperatively necessary.

General Halleck, the Union Commander in July, 1862, was himself a student of international law, and he was the author of a book on that subject.<sup>6</sup> He therefore called upon Dr. Lieber to assist the United States by preparing materials on the international law of war, a service whose first fruit was Lieber's *Guerilla Parties Considered with Reference to the Laws and Usages of War* (1862).<sup>7</sup> This work proved to be a preamble to the more extensive enterprise which Dr. Lieber was next called upon to perform by the United States.

By order of Secretary of War Stanton, dated December 17, 1862, a board consisting of Dr. Lieber and Generals Cadwalader, Hartsuff, Hitchcock and Martindale was created "to propose amendments or changes in the rules and articles of war and a code of regulations for the Government of Armies in the field *as authorized by the laws and usages of war.*"<sup>8</sup> It appears that the actual preparation of the proposed "code of regulations" was entrusted entirely to Dr. Lieber<sup>9</sup> with revisions to be made by the other members of the board. The result was transmitted to General Halleck on February 20, 1863, barely two months after the beginning of the project. The work of Lieber, with some additions and omissions by the "generals of the board" under the command of Major General Hitchcock, was adopted by the United States as the Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (April 24, 1863).

The Lieber Code contains ten sections, which are subdivided into one hundred and fifty-seven sections. A glance at the titles of these ten sections will give an idea of the scope of the enterprise :

- I. Martial Law — Military Jurisdiction — Military Necessity — Retaliation
- II. Public and Private Property of the Enemy — Protection of Persons, and Especially of Women; of Religion, the Arts and Sciences — Punishment of Crimes Against the Inhabitants of Hostile Countries
- III. Deserters — Prisoners of War — Hostages — Booty on the Battlefield
- IV. Partisans — Armed Enemies not belonging to the Hostile Army — Scouts — Armed Prowlers — War-rebels
- V. Safe-Conduct — Spies — War-traitors — Captured Messengers
- VI. Exchange of Prisoners — Flags of Truce — Abuse of the Flag of Truce — Flags of Protection
- VII. The parole
- VIII. Armistice — Capitulation
- IX. Assassination
- X. Insurrection — Civil War — Rebellion

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<sup>6</sup> *Id.* at 453-454.

<sup>7</sup> *Id.* at 454.

<sup>8</sup> *Ibid.* (Emphasis supplied.)

<sup>9</sup> *Ibid.*

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The Lieber Code was early held to be a general statement of the law of war as it then existed, and an objection that an alleged breach of paragraph 86 of General Orders No. 100 (non-intercourse between belligerents) had in fact occurred before the promulgation of the Lieber Code was therefore not sustained.<sup>10</sup> As a general statement of the law of war in 1863, much of the Lieber Code has naturally been superseded by the international conventions which have dealt with these topics since that time.<sup>11</sup> Provisions may be found within the Lieber Code, however, which represented an accurate view of the customs of war until the Geneva Conventions of 1949. Article 18 of the Lieber Code, for example, represents the view adopted by the American Military Government Court at Nuremberg in acquitting General von Leeb of the charge of having committed a violation of the law of war in firing on civilians fleeing from the besieged city of Leningrad:<sup>12</sup>

Article 18. When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

An occasional reference to the institution of slavery is found in the Lieber Code, but one has the impression that these references are motivated by a desire to propagandize a *causa belli* rather than a concern for historical precision in the field of comparative law. Article 41, for example, states that "The law of nature and nations has never acknowledged (slavery)."<sup>13</sup> In fact, one of the principal differences between the law of nature and the early law of nations was precisely that the latter did recognize slavery.<sup>14</sup>

Two points stand out today when one considers the Lieber Code as a whole. The first is perhaps implicit in Secretary Stanton's appointing orders of December 17, 1862, that the proposed code of regulations govern the United States Army "*as authorized by the laws and usages of war.*"<sup>15</sup> There is no inkling that the restraints imposed by the laws and customs of war should be observed only

<sup>10</sup> *Digest of Opinions of The Judge Advocate General of the Army* 244 (1866).

<sup>11</sup> Principally the Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1929 and 1949.

<sup>12</sup> JAGS Text No. 7, *Law of Land Warfare* 159 (1943). For a discussion of this aspect of *U.S. v. von Leeb*, see DEPT OF ARMY, PAMPHLET no. 27-161-2, II **INTERNATIONAL LAW** 51 (1962). This rule of customary law has since been ameliorated by Article 17 of the 1949 Geneva Convention for the Protection of Civilian Persons in Time of War.

<sup>13</sup> JAGS Text No. 7, *Law of Land Warfare* 164 (1943).

<sup>14</sup> BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 58 (1950). The practice of condemnation to slavery of captured prisoners was justified, in Roman times, as an advance over the earlier practice of wholesale slaughter for captured belligerents and civilians.

<sup>15</sup> Root, *supra* note 5, at 454. (Emphasis supplied.)

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insofar as it would be expedient to do so. In this connection Lieber was faithful to the charge, The definition of "military necessity" found in the Lieber Code is vastly different from the now discredited concept of *Kriegsraison*.<sup>16</sup> Article 14 of the Lieber Code defines "military necessity" as follows:<sup>17</sup>

Military necessity, as understood by modern civilized nations, **consists** in the necessity of those measures which are indispensable for securing the ends of the war, *and which are lawful according to the modern law and usages of war.*

The same conviction that "military necessity" cannot justify violations of the laws and customs of war is found in the successor to the Lieber Code, Field Manual 27-10, *The Law of Land Warfare*:<sup>18</sup>

The prohibitory effect of the law of war is not minimized by "military necessity", which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for **securing** the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden **by the** customary and conventional laws of war inasmuch as the latter **have** been developed and framed with consideration for the concept **of military** necessity.

The second point which strikes the reader of today is that the exigencies of practical military experience are constantly reflected in the Lieber Code. Without fudging on the duties of commanders under the laws of war, neither did Lieber seek to encumber them with codified, hopeful morality.<sup>19</sup> The concept of "military necessity" alluded to in the above-quoted paragraph 3a of Field Manual 27-10, *The Law of Land Warfare*, must constantly be borne in mind during the formulation of the rules of land warfare. Otherwise, the risk is incurred that commanders might dismiss this body of law as visionary *in toto*. Necessity, however, should not be equated with military convenience in the rules of war.<sup>20</sup> Dr. Lieber's formulation of the laws and usages of land warfare steers this narrow course with skill.

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"See, to the same effect, **DA PAM 27-161-2, II INTERNATIONAL LAW 9-10, (1962).**

<sup>17</sup> **JAGS** Text No. 7, *Law of Land Warfare* 158 (1943).

<sup>18</sup> U.S. DEP'T OF ARMY, FIELD MANUAL No. 27-10, **THE LAW OF LAND WARFARE**, para. 3a.

"Paragraph 60 of the Lieber Code reflects this attitude. "It is against the usage of modern war to resolve, in hatred and renege, to give no quarter. *So* body of troops has the right to declare that it will not give, and therefore will not **expect**, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners." **JAGS** Text No. 7, *Law of Land Warfare* 168 (1943). The more stringent, and in the present writer's view more visionary attitude is to be found in **FM 27-10, The Law of Land Warfare**, para. 85.

<sup>20</sup> Seither, in Major Kelly's phrase, should the absence of "blackletter" rules be equated with a lack of standards. See O'Brien, *Some Problems of the Law of War in Limited Nuclear Warfare*, 14 MIL. L. REV. 1 (1961).

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The influence of the Lieber Code was not confined to the conflict which occasioned it. It was generally adopted by the German Government for the conduct of hostilities in the Franco-Prussian War.<sup>21</sup> It exerted a great influence on the drafters of the Hague Convention of 1899 Respecting the Laws of War on Land, which, in turn, was revised during the Hague Regulations of 1907,<sup>22</sup> and served as a starting point for the more recent Geneva Conventions on the subject.

### III. CONCLUSION

The Lieber Code, the first codification of the laws of war ever issued to a national army for its guidance and compliance, was an important first step in defining those minimum restraints which are essential to the prosecution of hostilities by civilized states. The Nuremberg and Tokyo decisions have suggested that these restraints are perhaps more honored in the breach than by observance. It is none the less to the credit of the United States Army that the Lieber Code is part of our heritage, and that observance of its precepts is an essential part of the fiber of a civilized armed force, for by its self-imposed limitations on the use of force it reminds us of the American tradition which our armed forces represent and defend. It was drafted by a man who had first hand experience in warfare, and whose own family was disrupted by the American Civil War. The Lieber Code reflects both facets of Dr. Lieber's own experience with warfare. His letter to General Halleck of May 20, 1863, mentions some of the underlying reasons of imperative military necessity favoring the vigorous enforcement of the Lieber Code. Speaking in particular of the "wanton destruction of property", Lieber stated :<sup>23</sup>

It does incalculable injury. It demoralizes our troops ; it annihilates wealth irrecoverably, and makes a return to a state of peace more and more difficult.

These precepts are not outdated, nor is the Lieber Code. The philosophy of the Lieber Code could not have a lesser relevance for the United States Army in the present context of world affairs than it did at a time when the United States was fighting for its very life.

WILLIAM S. SHEPARD\*

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<sup>21</sup> Root, *supra* note 5, at 456.

<sup>22</sup> II OPPENHEIM'S INTERNATIONAL LAW 228 (Lauterpach ed. 1952). The article by article relationship between the Lieber Code and the Hague Convention of 1899 is shown in Root, *supra* note 5, at 466-469.

<sup>23</sup> Root, *supra* note 5, at 455.

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By Order of the Secretary of the Army :

EARLE G. WHEELER,  
*General, United States Army,*  
*Chief of Staff.*

Official :

J. C. LAMBERT,  
*Major General, United States Army,*  
*The Adjutant General.*

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